

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION

----- )  
 )  
VARIETY STORES, INC., )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. 5:14-CV-217-BO  
 )  
 )  
WALMART STORES, INC., )  
 )  
Defendant. )  
-----

MONDAY, OCTOBER 22, 2018  
JURY TRIAL/DAY 1  
BEFORE THE HONORABLE TERRENCE W. BOYLE  
UNITED STATES CHIEF JUDGE

MICHELLE A. MCGIRR, RPR, CRR, CRC  
Official Court Reporter  
United States District Court  
Raleigh, North Carolina  
(Stenotype with computer-aided transcription)

1    **On Behalf of the Plaintiff:**

2  
3    **W. THAD ADAMS, III, Esquire**  
4    **S. ALEX LONG, JR., Esquire**  
5    **CHRISTINA DAVIDSON TRIMMER, Esquire**  
6    **SHUMAKER, LOOP & KENDRICK, LLP**  
7    101 South Tryon Street  
8    Suite 2200  
9    Charlotte, North Carolina    28280

10  
11    **SCOTT P. SHAW, Esquire**  
12    **CALL & JENSEN**  
13    610 Newport Center Drive  
14    Suite 700  
15    Newport Beach, California    92660

16  
17  
18  
19    **On Behalf of the Defendant:**

20  
21    **MARK PUZELLA, Esquire**  
22    **SHERYL KOVAL GARKO, Esquire**  
23    **FISH & RICHARDSON, P.C.**  
24    One Marina Park Drive  
25    Boston, MA 02210-1878

26  
27    **R. DAVID HOSP, Esquire**  
28    **FISH & RICHARDSON, P.C.**  
29    601 Lexington Avenue  
30    52nd Floor  
31    New York, New York    10022

I N D E X

**OPENING REMARKS TO THE JURY:**

By the Court, at page 62

**OPENING STATEMENTS:**

By Mr. Adams, at page 67

By Mr. Puzella, at page 80

**WITNESS:**

Timothy Blackburn II

**EXAMINATION:**

**PAGE**

Direct Examination by Mr. Adams	89
Cross-Examination by Mr. Puzella	150
Redirect Examination by Mr. Adams	170

**WITNESS:**

Karen Dineen (via deposition)  
[As read into the record by Attorney Trimmer]

**EXAMINATION:**

Direct Examination by Mr. Adams	175
---------------------------------	-----

**PLAINTFF'S EXHIBITS:**

<u>No.</u>		<u>In Evid.</u>
58		106
P-1		107
P-58 (E)		108
P-59 (pg. 22)		110
P-59 (pg. 15)		112
P-59 (pg. 1)		112
P-59 (Pg. 30)		112
78		114
P-57		116
P-63		118

(Continuing...)

I-N-D-E-X  
(Continued...)

**PLAINTIFF'S EXHIBITS:**

<u>No.</u>	<u>In Evid.</u>
P-8	122
P-2	124
P-62	129
PX-2	134
PX-3	136
PX-4	136
PX-5	137
P-6 and P-7	142
P87(A) and P87(B)	144
PX-8	146
P-22	173
59	173
79	173
(79 withdrawn at pg. 174)	
P-71	191
P-72	191
P-14	191
P-5	191

\* \* \*

**DEFENDANT'S EXHIBITS:**

<u>No.</u>	<u>ID</u>	<u>In Evid.</u>
D-50		161
D-191		167

\* \* \*

1 (Monday, October 22, 2018, commencing at 10:05 a.m.)

2 **P R O C E E D I N G S**

3  
4 THE COURT: Good morning, ladies and gentlemen.  
5 Thank you for being here. We're going to pick a jury and  
6 commence the civil trial of a lawsuit involving a trademark.

7 And at this time I would ask the clerk to give you  
8 the oath and then we'll call a group into the jury box.

9 THE CLERK: Please stand and raise your right hand  
10 to be sworn.

11 (Jury panel sworn)

12 THE COURT: Go ahead.

13 THE CLERK: Please come forward. Gladys Gunia,  
14 Justus Anderson, Martha Nixon, Clark Twiddy, Vera Carr,  
15 Howard Grogan, Robert Mizelle, Keith Harmon, Eleanor Bond,  
16 Lynn Riche, Sonya Dent, Steven Neithamer, Brittany Wilson and  
17 Jo Ann Cahoon.

18 (Potential jurors seated in the jury box)

19 THE COURT: Good morning, ladies and gentlemen. My  
20 name is Terrence Boyle. I am a federal trial judge and we're  
21 here in the United States District Court in Elizabeth City.  
22 This is the Eastern District of North Carolina. It covers  
23 half the state. We have courthouses in Raleigh,  
24 Fayetteville, Wilmington, New Bern, Greenville and Elizabeth  
25 City. My chambers are here in Elizabeth City primarily and

1 so this trial will be conducted here.

2 This is a federal trademark case. Intellectual  
3 property trademark. The United States laws authorize people  
4 who own products and market them to have trademarks and  
5 you're familiar with that. You see them every day. The  
6 Coca-Cola bottle, the Polo pony, the Nike splash. Those are  
7 all things that are in everyone's common-day knowledge. This  
8 is a lawsuit between two, what would you call them,  
9 commercial forces in the business world, in the community.

10 The plaintiff is Roses or Variety Wholesalers,  
11 which is the parent company of Roses. I think, but I may not  
12 be exactly correct, that Roses or Variety brands, what,  
13 Eagles maybe, do you have Eagles?

14 MR. ADAMS: I don't believe so, your Honor.

15 THE COURT: What do you have? Do you have Family  
16 Dollar or Dollar -- what are some of the other brand names?

17 MR. ADAMS: There's a Dollar Store, Maxway, several  
18 other smaller brands.

19 THE COURT: But Roses is the principal outlet?

20 MR. ADAMS: By far.

21 THE COURT: Okay. So Variety is a regional  
22 discount retail store which you may or may not be familiar  
23 with. There are plenty of them around here.

24 The defendant is Walmart. The actual Walmart. So  
25 what they're in suit over is the marketing and trademark for

1 grills and grill accessories and outdoor products.

2 In 1994, Variety had a registered trademark called  
3 The Backyard. That's the trademark. And it has that for  
4 retail store supplies in garden equipment and supplies.  
5 Variety uses The Backyard trademark to market outdoor  
6 products, grills, grill accessories.

7 They also use Backyard Barbecue, but that's not a  
8 registered trademark, but they have a trademark protection  
9 for -- if it's established, for that product. Over the  
10 course of time they've sold a lot of products with that  
11 brand.

12 In 2010, Walmart began selling grills and grill  
13 accessories with the brand on them called Backyard Barbecue.  
14 Later that brand became Backyard Grill. This lawsuit was  
15 started to stop Walmart from using that registered trademark  
16 or something that caused a likelihood of confusion between  
17 that registered trademark, which is The Backyard -- Just  
18 think of that -- and whether Walmart's sale and branding of  
19 similar products violates that trademark.

20 The case is not going to be highly complicated.  
21 It's a fairly simple thing. A group of you will be sworn to  
22 serve as the jurors in the case and you will have to decide  
23 whether Walmart's use of the protected mark or something like  
24 the protected mark creates confusion so that someone would  
25 buy the product at Walmart thinking that it was the other

1 product. Does that make any sense to you?

2 So as I said, it's going to ask you to rely on your  
3 common sense, your judgment. I'm going to ask you some  
4 questions because these lawyers want to know who you are, but  
5 it's something that everybody should have some familiarity  
6 with in eastern North Carolina or in the state. So we'll go  
7 through like that.

8 I'll just jump right in. Raise your hand if  
9 you've -- if you've shopped at some point in time in Walmart.  
10 Anybody who hasn't?

11 (No hands raised)

12 THE COURT: Okay. You are Ms. Gunia. How do you  
13 pronounce your name? Gunia.

14 THE JUROR: I raised my hand.

15 THE COURT: I'm going to just talk to you for a  
16 minute. What's your last name?

17 THE JUROR: Gunia.

18 THE COURT: Gunia, okay. Where do you live?

19 THE JUROR: I live in Elizabeth City.

20 THE COURT: Okay. And do you work?

21 THE JUROR: I'm retired.

22 THE COURT: What did you do before that?

23 THE JUROR: I was an electronics engineer.

24 THE COURT: Where did you work?

25 THE JUROR: I worked in mostly Philadelphia for 26



1 years.

2 THE COURT: How long have you been in Elizabeth  
3 City?

4 THE JUROR: Almost 15.

5 THE COURT: Okay. And do you ever shop at Walmart?

6 THE JUROR: Yes.

7 THE COURT: You go every day, every week, every  
8 month, every year, every five years, how would  
9 you characterize --

10 THE JUROR: Probably every month.

11 THE COURT: Every month. And without being nosey,  
12 what kind of things do you buy at Walmart?

13 THE JUROR: Groceries.

14 THE COURT: Groceries, okay. Do you ever buy  
15 hardware or fixtures, things like that?

16 THE JUROR: I'm sure I have.

17 THE COURT: Have you ever bought a grill there?

18 THE JUROR: No.

19 THE COURT: Have you ever bought a grill anywhere?

20 THE JUROR: Yes.

21 THE COURT: Where would you buy one?

22 THE JUROR: Lowe's.

23 THE COURT: Lowe's, okay. Do you think that --  
24 what kind of -- when you went to Lowe's -- have you bought a  
25 grill more than once at Lowe's?

1 THE JUROR: I don't believe so.

2 THE COURT: Was it a gas grill or a charcoal grill?

3 THE JUROR: It's gas.

4 THE COURT: Okay. And why did you go to Lowe's?

5 THE JUROR: We shop there a lot and they had a  
6 grill I liked.

7 THE COURT: Okay. Have you ever bought any outdoor  
8 products like lawn chairs or tables or anything from either  
9 Roses or Walmart?

10 THE JUROR: Yes.

11 THE COURT: You have.

12 THE JUROR: Yes.

13 THE COURT: What have you bought?

14 THE JUROR: I bought some patio furniture.

15 THE COURT: Where did you buy that?

16 THE JUROR: Walmart.

17 THE COURT: Have you ever shopped at Roses?

18 THE JUROR: Yes.

19 THE COURT: What do you buy at Roses?

20 THE JUROR: Cleaning products.

21 THE COURT: Do you look for brand names when you're  
22 at Roses or do you look for price points?

23 THE JUROR: Brand names.

24 THE COURT: Okay.

25 Mr. Anderson, where do you live?

1 THE JUROR: I live in Edenton, sir.

2 THE COURT: And that's in Chowan County?

3 THE JUROR: Chowan County.

4 THE COURT: And what do you do for a living?

5 THE JUROR: I'm retired.

6 THE COURT: What did you used to do?

7 THE JUROR: I was a former Navy Seal and worked on  
8 government contracts.

9 THE COURT: So you served on active duty in the  
10 Navy?

11 THE JUROR: Yes, sir.

12 THE COURT: For how long?

13 THE JUROR: Just a little over 20 years.

14 THE COURT: Okay. And what brings you to Chowan  
15 County? Were you from there?

16 THE JUROR: No. I met my wife in Hertford and I  
17 worked at some of the local bases and ended up retiring  
18 there.

19 THE COURT: There's no Walmart in Chowan County.  
20 The closest ones are either Williamson, Ahoskie or Elizabeth  
21 City, I think.

22 THE JUROR: That's correct.

23 THE COURT: Do you ever go to Walmart?

24 THE JUROR: When I have to.

25 THE COURT: Not frequently?

1 THE JUROR: We end up going probably once a month.

2 THE COURT: Okay. And what kind of products,  
3 without being nosey, do you buy there?

4 THE JUROR: Mostly groceries. My wife looks at  
5 groceries, I look at the firearms and ammo.

6 THE COURT: Right. And do you go to the Elizabeth  
7 City store?

8 THE JUROR: Yes, sir.

9 THE COURT: You don't go to any other ones?

10 THE JUROR: I have.

11 THE COURT: Have you ever purchased a grill, a  
12 cooking grill, like charcoal grill or gas grill?

13 THE JUROR: No, I haven't.

14 THE COURT: You have not.

15 THE JUROR: No, sir.

16 THE COURT: You don't have one at home?

17 THE JUROR: I do have a grill that's homemade.

18 THE COURT: You made it?

19 THE JUROR: Yes, sir.

20 THE COURT: Okay. So have you ever bought other  
21 products at Walmart that are outdoor products like chairs,  
22 umbrellas, plant tables, things like that?

23 THE JUROR: Bought some umbrellas.

24 THE COURT: You what?

25 THE JUROR: We purchased some umbrellas.

1 THE COURT: Umbrellas.

2 THE JUROR: Outside umbrellas, yes, sir.

3 THE COURT: And have you shopped at Roses at all?

4 THE JUROR: I have.

5 THE COURT: There's one in Edenton down on 32.

6 THE JUROR: Yes, sir.

7 THE COURT: And is that the one that you've been  
8 to?

9 THE JUROR: It is.

10 THE COURT: What do you buy when you go to Roses?

11 THE JUROR: Bleach.

12 THE COURT: Bleach?

13 THE JUROR: Bleach.

14 THE COURT: So you don't care about the brand, do  
15 you?

16 THE JUROR: Cheapest one, sir. Use it for  
17 cleaning.

18 THE COURT: And do you go to Roses other places or  
19 just the one in Edenton?

20 THE JUROR: Pretty much the one in Edenton.

21 THE COURT: So you made your own grill?

22 THE JUROR: Yes, sir.

23 THE COURT: Is it a gas or charcoal?

24 THE JUROR: Charcoal and wood.

25 THE COURT: Okay. Thank you.

1 THE JUROR: You're welcome.

2 THE COURT: Ms. Nixon, where are you from?

3 THE JUROR: Town of Hertford.

4 THE COURT: What do you do for a living?

5 THE JUROR: Director of technology for Perquimans  
6 County School System.

7 THE COURT: And have you ever shopped at Walmart?

8 THE JUROR: Yes.

9 THE COURT: And again, I identified the ones in  
10 this area. Is that where you shop?

11 THE JUROR: Yes.

12 THE COURT: Mostly in Elizabeth City?

13 THE JUROR: Yes.

14 THE COURT: Have you ever been to any other Walmart  
15 besides Elizabeth City?

16 THE JUROR: Yes.

17 THE COURT: Okay. Have you ever bought a grill  
18 product at Walmart?

19 THE JUROR: I don't think I purchased it at  
20 Walmart.

21 THE COURT: But you have purchased a grill product,  
22 either charcoal or wood or gas?

23 THE JUROR: Gas.

24 THE COURT: Which one was it?

25 THE JUROR: Gas.

1 THE COURT: And where did you buy that?

2 THE JUROR: One from a local store in Perquimans  
3 County.

4 THE COURT: Like hardware store kind of thing?

5 THE JUROR: At a Tar Heel fireplace store. And  
6 Lowe's was the other place.

7 THE COURT: Say that --

8 THE JUROR: Lowe's.

9 THE COURT: Lowe's?

10 THE JUROR: Um-hum.

11 THE COURT: Okay. And with either of those  
12 purchases -- so you don't have a charcoal grill, you have a  
13 gas grill.

14 THE JUROR: Correct.

15 THE COURT: So with either them, was the brand name  
16 -- like I'm just thinking out loud in my experience, I know  
17 Weber is like a national name and I think Char-Grill is a  
18 popular name if you're looking for reliability or something  
19 like that. If you're trying to buy something, you know what  
20 it is as opposed to a generic name. So would that matter to  
21 you?

22 THE JUROR: Yes.

23 THE COURT: The brand name?

24 THE JUROR: Um-hum.

25 THE COURT: Did you actually buy a brand name?

1 THE JUROR: I did.

2 THE COURT: What did you buy?

3 THE JUROR: I bought a Weber Holland grill.

4 THE COURT: Okay. And those would be a little bit  
5 upscale from the bottom-level grill?

6 THE JUROR: Yes.

7 THE COURT: Okay. Thank you.

8 Hello, Mr. Twiddy.

9 THE JUROR: Good morning, sir.

10 THE COURT: Where are you from and what do you do?

11 THE JUROR: Dare County. Kitty Hawk. And I work  
12 in the property management business.

13 THE COURT: Real estate?

14 THE JUROR: Yes, sir.

15 THE COURT: Are you with a company?

16 THE JUROR: I am the president of Twiddy & Company.

17 THE COURT: And is there a Walmart on the beach?

18 THE JUROR: There is, yes, sir, at Kitty Hawk.

19 THE COURT: In one of the shopping centers?

20 THE JUROR: Yes, sir. Right as you come across the  
21 bridge on the right.

22 THE COURT: Oh, okay. So is it the anchor for that  
23 shopping center?

24 THE JUROR: Yes, sir.

25 THE COURT: As you come across Powells Point and --



1           THE JUROR: Come across Currituck Bridge, go to the  
2 second stop light and make a right. Harris Teeter, Home  
3 Depot and Walmart.

4           THE COURT: The golf course is on the left? Or the  
5 school is on the left?

6           THE JUROR: Golf course on the left, school on the  
7 left, Walmart on the right.

8           THE COURT: And do you shop there?

9           THE JUROR: Yes, sir.

10          THE COURT: Okay. You go every day, every week,  
11 every month?

12          THE JUROR: Probably once a month as needed.

13          THE COURT: Okay. And typically are there some  
14 things you buy there or do you buy everything there?

15          THE JUROR: A little bit of everything, but  
16 certainly groceries, and I have bought outdoor things there  
17 in the past. Things like grill tools I have not bought --

18          THE COURT: Things like what?

19          THE JUROR: Things like grill tools or outdoor  
20 material. Ammunition, things like that. Never bought a  
21 grill there.

22          THE COURT: Okay. Do you own a grill?

23          THE JUROR: Yes, sir.

24          THE COURT: And gas or --

25          THE JUROR: I like to grill so I have a charcoal

1 grill, a Wilmington grill, which is a gas grill, and believe  
2 it or not I actually have a wood smoker as well.

3 THE COURT: And you bought those at specialty  
4 places or --

5 THE JUROR: All spots. Specialty places,  
6 Kellogg's, and I bought the smoker at Lowe's.

7 THE COURT: Kellogg is a hardware store, isn't it?

8 THE JUROR: Yes, sir. Kellogg's.

9 THE COURT: And Lowe's is on the beach, too?

10 THE JUROR: Yes, sir.

11 THE COURT: Would you ever consider going to either  
12 Roses or Walmart to buy a gas grill?

13 THE JUROR: Yes, sir.

14 THE COURT: You would?

15 THE JUROR: I would.

16 THE COURT: Okay. What would you look for there, a  
17 brand name or generic?

18 THE JUROR: I would look for a brand name and I'd  
19 look for good construction.

20 THE COURT: Is buying a grill sort of more than  
21 just a casual thing, is it like you invest more interest in  
22 it because of what -- the use you're going to put it to?

23 THE JUROR: Yes, sir.

24 THE COURT: Would you spend more money buying it  
25 for yourself than buying it for like an organization or your

1 shop or something like that?

2 THE JUROR: I know I enjoy it, so I'm much more  
3 likely to invest in things I enjoy. So to answer your  
4 question, yes, sir.

5 THE COURT: Okay. And is there a Roses on the  
6 beach?

7 THE JUROR: There is not. Closest Roses I'm aware  
8 of, there's one in Williamson and one in Plymouth.

9 THE COURT: Okay. Thank you very much.

10 THE JUROR: Thank you.

11 THE COURT: Ms. Carr, where are you from?

12 THE JUROR: Plymouth.

13 THE COURT: And what do you do for a living?

14 THE JUROR: I am a cashier at Speedway.

15 THE COURT: Speedway is a gas station and  
16 convenience store?

17 THE JUROR: Yes; um-hum.

18 THE COURT: And there's one on 64 bypass in  
19 Plymouth, is that where you work?

20 THE JUROR: No, I'm in the middle. The one that's  
21 in the middle.

22 THE COURT: Okay. But you sell cigarettes, candy,  
23 items, things like that. You don't sell hardware like -- do  
24 you have grills there?

25 THE JUROR: No.

1           THE COURT: No, okay. And do you ever shop at  
2 Walmart?

3           THE JUROR: Yes. All the time.

4           THE COURT: So you probably go back to Williamson  
5 to Walmart?

6           THE JUROR: Yes.

7           THE COURT: That would be the closest one to go  
8 back on 64.

9           THE JUROR: Yes. Um-hum. Yes.

10          THE COURT: And what do you buy there?

11          THE JUROR: Groceries, different stuff, personal  
12 items.

13          THE COURT: Do you ever buy shoes, clothing, things  
14 like that?

15          THE JUROR: No, not shoes, but clothes.

16          THE COURT: Do you ever buy hardware or appliances  
17 there, like radios, clocks, grills, things like that?

18          THE JUROR: I think I bought a heater there.

19          THE COURT: A heater?

20          THE JUROR: Yeah, um-hum.

21          THE COURT: Okay. And do you shop at Roses?

22          THE JUROR: Yes.

23          THE COURT: Is there a Roses in Plymouth?

24          THE JUROR: Yes.

25          THE COURT: Okay. So is that like if you needed

1 something quick, would you go to the Roses instead of the  
2 Walmart?

3 THE JUROR: Yes.

4 THE COURT: You feel like you get the same  
5 experience going to one or the other, it's just a question of  
6 where you are and how quickly you need to get it?

7 THE JUROR: Yes.

8 THE COURT: Is that -- I mean, is that accurate for  
9 you?

10 THE JUROR: Yes.

11 THE COURT: And when you're shopping in either  
12 Walmart or Roses, do you compare the prices and look at what  
13 the models are or is the price the main thing that you're  
14 looking for?

15 THE JUROR: No, I'm actually looking at how it's  
16 made.

17 THE COURT: All right. Thank you.  
18 Hello, Mr. Grogan.

19 THE JUROR: Hi.

20 THE COURT: Where do you live?

21 THE JUROR: In Moyock.

22 THE COURT: And have you lived there a long time?

23 THE JUROR: 12 years.

24 THE COURT: Where did you live before that?

25 THE JUROR: Philadelphia.

1           THE COURT: And so if you're in Moyock, you might  
2 go to Virginia to Walmart or Roses?

3           THE JUROR: Correct.

4           THE COURT: Do you ever do that?

5           THE JUROR: Yes.

6           THE COURT: Okay. I'm not familiar with the  
7 Tidewater area as much as here. So how close are you to  
8 Walmart where you live?

9           THE JUROR: 20 minutes up in Chesapeake.

10          THE COURT: It's in Chesapeake?

11          THE JUROR: Yes, sir.

12          THE COURT: Chesapeake's on the other side of the  
13 line from Moyock?

14          THE JUROR: Yes.

15          THE COURT: And you own a grill?

16          THE JUROR: Yes.

17          THE COURT: Charcoal or wood or --

18          THE JUROR: Charcoal.

19          THE COURT: Charcoal. You don't have a gas grill?

20          THE JUROR: No.

21          THE COURT: And how often do you buy a grill, when  
22 they wear out or --

23          THE JUROR: Once every ten years maybe.

24          THE COURT: And so is it a substantial grill, like  
25 does it have a hood on it or --

1 THE JUROR: No. It's maybe 24 inches in diameter.

2 THE COURT: And is it a brand name?

3 THE JUROR: It's a Weber.

4 THE COURT: Okay. So where did you buy that?

5 THE JUROR: Home Depot.

6 THE COURT: Okay. Home Depot is like a Lowe's kind  
7 of place, isn't it?

8 THE JUROR: Yes.

9 THE COURT: I don't personally go to Home Depot  
10 because I don't know where it is. There may be one around  
11 here, but I would go to Lowe's. But they sell -- they go  
12 head to head with Lowe's sort of?

13 THE JUROR: Correct.

14 THE COURT: And without being nosey again, what did  
15 the Weber grill cost, like 60 bucks or 70 bucks?

16 THE JUROR: No. It was about \$24.

17 THE COURT: Okay. So it's not one that you  
18 expected to use a lot or keep for a long time?

19 THE JUROR: No.

20 THE COURT: Occasional use if you want to cook  
21 hamburgers or hot dogs --

22 THE JUROR: Correct.

23 THE COURT: -- something like that. Tell me about  
24 your contact with Walmart. How often do you go there?

25 THE JUROR: We shop there probably once a week for

1 groceries.

2 THE COURT: So is it your primary grocery store?

3 THE JUROR: Correct.

4 THE COURT: And they have -- again, I'm not that  
5 familiar with it, but they have a grocery section that's  
6 pretty big and then they have all the other things that you  
7 could go to Walmart for. Do you stick with groceries or --

8 THE JUROR: I might buy some fishing equipment  
9 there once in awhile.

10 THE COURT: They have all kinds of departments.  
11 Sporting goods, apparel, clothes, furnishings. So you  
12 basically do groceries and if you need something  
13 recreationally --

14 THE JUROR: Correct.

15 THE COURT: -- you might go there. Does it matter  
16 to you when you're shopping there what the brand says? I  
17 mean, just curious. Are you looking for something that is an  
18 identifiable brand that you know and see advertised and have  
19 bought over the course of your life or are you looking for a  
20 price point and sort of weighing in the --

21 THE JUROR: My wife works at Home Depot, so when an  
22 item goes on sale, I'll take advantage of it. And it's  
23 really a price decision.

24 THE COURT: Okay. Price decision to buy at  
25 Walmart.



1 THE JUROR: No, Home Depot because it was on sale.

2 THE COURT: Yeah. You're getting the best deal in  
3 your experience at Home Depot because you're an insider  
4 there.

5 THE JUROR: Correct.

6 THE COURT: So what would cause you to buy  
7 something at Walmart; that they didn't have it at Home Depot?

8 THE JUROR: Depends what it was.

9 THE COURT: I'm going to come back to Mr. Mizelle  
10 in a minute but...

11 Any of you own stock, shares of stock like on the  
12 Stock Exchange, in Walmart?

13 (No hands raised)

14 THE COURT: Okay. I don't think Roses is -- or  
15 Variety is a traded company, is it?

16 MR. ADAMS: No, it's not, your Honor. It's  
17 privately owned.

18 THE COURT: But Walmart is on the big board, right?

19 MR. PUZELLA: Correct, your Honor.

20 THE COURT: Have any of you ever worked inside at a  
21 Walmart? Been an employee of Walmart?

22 (One juror hand raised)

23 THE COURT: I'll have -- Mr. Niethamer.

24 THE JUROR: Yes, sir. I worked for Sam's Club in  
25 Chesapeake probably 25 years ago.

1 THE COURT: How long did you work there?

2 THE JUROR: Probably six months.

3 THE COURT: And what did you do?

4 THE JUROR: I was just a maintenance man. I had  
5 retired from the Navy, and I was in between jobs before I  
6 went back to work for the Navy.

7 THE COURT: Anyone else work for Walmart or one of  
8 its affiliates?

9 (No hands raised)

10 THE COURT: Has anybody worked at a Roses or any of  
11 the other outlets that Variety Wholesalers owns?

12 (No hands raised)

13 THE COURT: Have you worked at any job in that  
14 market area, retail, like Lowe's or -- your wife's at Home  
15 Depot. Anybody have any experience working in those  
16 settings?

17 (No hands raised)

18 THE COURT: Mr. Mizelle, where are you from?

19 THE JUROR: I'm from Windsor, Bertie County.

20 THE COURT: And what did you do for work?

21 THE JUROR: Building inspector for Hertford County.

22 THE COURT: So Windsor is your office?

23 THE JUROR: Yes, sir.

24 THE COURT: And do you ever go to Walmart?

25 THE JUROR: Yes, sir. Twice a month.

1 THE COURT: Where do you go?

2 THE JUROR: The Williamston or Ahoskie.

3 THE COURT: There's a Walmart in Ahoskie, too?

4 THE JUROR: Yes.

5 THE COURT: What kind of products do you buy there?

6 THE JUROR: Groceries and personal products and  
7 maybe a few apparel.

8 THE COURT: Do you own a grill?

9 THE JUROR: I do.

10 THE COURT: Is it gas or charcoal?

11 THE JUROR: It's gas.

12 THE COURT: And where did you buy that?

13 THE JUROR: It was a gift and it's --

14 THE COURT: Someone gave it to you?

15 THE JUROR: Yes.

16 THE COURT: Is it a branded --

17 THE JUROR: I believe it's Char-Broil. Broil  
18 Charcoal (sic).

19 THE COURT: Char-Grill?

20 THE JUROR: Char-Grill maybe.

21 THE COURT: Char-Grill is like the char and  
22 a hyphen and the grill. It's got a silver hood.

23 THE JUROR: I believe that's what it is.

24 THE COURT: Have you ever bought a grill yourself?

25 THE JUROR: I have not. They're gifted to me most

1 of the time.

2 THE COURT: Thank you.

3 Let's see. You're Ms. Cahoon?

4 THE JUROR: Yes, sir.

5 THE COURT: And where do you live?

6 THE JUROR: Columbia, Tyrrel County.

7 THE COURT: And what do you do for a living?

8 THE JUROR: I work for Cherry Farm Seed. We  
9 package soybean and wheat seed.

10 THE COURT: Big outfit.

11 THE JUROR: It is.

12 THE COURT: Amazing. What kind of seed, soybean  
13 and what else?

14 THE JUROR: Soybean and wheat.

15 THE COURT: Wheat seeds. Do they sell any other  
16 seeds?

17 THE JUROR: No, not at this time. At one time they  
18 did, but not anymore.

19 THE COURT: And how do you measure it, by the  
20 pounds or bushels?

21 THE JUROR: By bushels, right. And then when we  
22 package it, we package it by seed count and it has to be like  
23 140,000 seeds per unit.

24 THE COURT: A unit is a bag?

25 THE JUROR: It can be a bag. It's kind of --

1           THE COURT: Tell me how many -- how much do they  
2 sell? They sell nationwide, don't they?

3           THE JUROR: Yes. We package seeds for a lot of  
4 different companies, Monsanto, CPS -- which just changed  
5 their names -- Remington. A lot of different companies.

6           THE COURT: Are the seeds all coming from the local  
7 area or are you raising them all over the country?

8           THE JUROR: A lot of them are coming from our area,  
9 yep. All the way from -- we have some growers down in South  
10 Carolina.

11          THE COURT: So you sell to middlemen who are  
12 distributors and they sell to farmers?

13          THE JUROR: Right. We, like, contract with the  
14 growers and get them to grow the seed, and then once at  
15 harvest, then the companies come in and, like, buy it and  
16 then tell us how they want it packaged and we package it.

17          THE COURT: So the closest Walmart for you is in  
18 Little Washington maybe or --

19          THE JUROR: Elizabeth City.

20          THE COURT: Elizabeth City. Okay. Not  
21 Williamston, or you don't go to Williamston?

22          THE JUROR: Just don't go that way too much.

23          THE COURT: You come up this way?

24          THE JUROR: Yes.

25          THE COURT: Do you shop ever at Walmart?

1 THE JUROR: I do shop at Walmart.

2 THE COURT: How frequently?

3 THE JUROR: Maybe a couple times a month.

4 THE COURT: And what kind of products do you buy?

5 THE JUROR: A little bit of everything.

6 THE COURT: Have you ever -- do you own a grill?

7 THE JUROR: I do.

8 THE COURT: Is it a gas or charcoal grill?

9 THE JUROR: Charcoal.

10 THE COURT: Where did you buy that?

11 THE JUROR: Walmart.

12 THE COURT: Okay. And without being nosey again,  
13 about what did you pay for it, like \$20, \$40, \$80?

14 THE JUROR: I can't really remember, but I think it  
15 was like maybe around 40. It was just one of those little  
16 small ones. Little round Weber. (Indicating).

17 THE COURT: It's a Weber?

18 THE JUROR: It is.

19 THE COURT: But you bought it at Walmart?

20 THE JUROR: I believe so.

21 THE COURT: Okay. And you buy charcoal and use it  
22 for -- to cook that way when you barbecue?

23 THE JUROR: Um-hum.

24 THE COURT: Okay. Do you ever shop at Roses?

25 THE JUROR: Yes.

1 THE COURT: Where do you shop at Roses, in Edenton?

2 THE JUROR: Edenton and Plymouth sometimes --

3 THE COURT: There's a Roses in Plymouth, too.

4 THE JUROR: Um-hum.

5 THE COURT: And what do you buy at Roses?

6 THE JUROR: I bought a chair one time. I bought  
7 plants, potting plants. A little bit of everything.

8 THE COURT: If you were going to buy a grill, would  
9 you go to Roses or Walmart again?

10 THE JUROR: I'd probably go to Walmart.

11 THE COURT: Thank you.

12 Ms. Wilson, where are you from?

13 THE JUROR: Elizabeth City.

14 THE COURT: And what do you do for a living?

15 THE JUROR: I'm a nurse.

16 THE COURT: And what kind of a nurse?

17 THE JUROR: I'm an intensive care unit nurse.

18 THE COURT: At the hospital?

19 THE JUROR: Chesapeake Regional.

20 THE COURT: So you commute back and forth?

21 THE JUROR: I do, yeah.

22 THE COURT: And are you -- you're a registered  
23 nurse?

24 THE JUROR: I am a registered nurse, yes.

25 THE COURT: Do you ever shop at Walmart?

1 THE JUROR: I do, yeah.

2 THE COURT: And what do you buy?

3 THE JUROR: Everything. Food, clothes.

4 Everything.

5 THE COURT: Are you married or single?

6 THE JUROR: I am married.

7 THE COURT: Do you have a grill at home?

8 THE JUROR: No.

9 THE COURT: No. You don't have anything that will  
10 let you cook outdoors?

11 THE JUROR: Huh-uh.

12 THE COURT: Have you ever looked at buying a grill?

13 THE JUROR: No.

14 THE COURT: And have you ever shopped at Roses?

15 THE JUROR: I have.

16 THE COURT: Where do you go to Roses?

17 THE JUROR: Food, mostly food. Where? Where?

18 Elizabeth City.

19 THE COURT: Where is the Roses -- it's over at the  
20 mall?

21 THE JUROR: Yeah. Isn't there a Roses in Elizabeth  
22 City?

23 THE COURT: Yeah. There used to be one years ago.

24 THE JUROR: Yeah.

25 THE COURT: At Southgate Mall.



1 THE JUROR: Um-hum.

2 THE COURT: And what do you buy there?

3 THE JUROR: Food.

4 THE COURT: Thank you.

5 Mr. Neithamer, you said you were in the Navy?

6 THE JUROR: Yes, sir, retired. I retired from the  
7 Navy.

8 THE COURT: Where do you live now?

9 THE JUROR: In Andlett. In Currituck County.

10 THE COURT: And you worked at a Sam's for awhile?

11 THE JUROR: For six months.

12 THE COURT: Shortly. Do you ever go to Walmart  
13 now?

14 THE JUROR: Yes, sir, I do.

15 THE COURT: Where do you go?

16 THE JUROR: We go to the one in Kitty Hawk about  
17 twice a month, and when we go to Chesapeake, we go to the one  
18 in Edinburgh. It's a little area.

19 THE COURT: In Chesapeake?

20 THE JUROR: Edinburgh.

21 THE COURT: In Chesapeake?

22 THE JUROR: Yes, sir.

23 THE COURT: What do you buy at --

24 THE JUROR: Groceries and pet supplies.

25 THE COURT: Do you own a grill?

1 THE JUROR: No, sir.

2 THE COURT: Ever owned a grill?

3 THE JUROR: I have. Charcoal.

4 THE COURT: And where did you get them, like  
5 hardware stores, Lowe's, Home Depot?

6 THE JUROR: Probably Lowe's or Home Depot.

7 THE COURT: It's not an item that you're -- that's  
8 essential to you?

9 THE JUROR: No, sir. I don't remember the last  
10 time I bought one so --

11 THE COURT: Thank you.

12 Ms. Dent, where are you from?

13 THE JUROR: Ahoskie, North Carolina.

14 THE COURT: And what do you do for a living?

15 THE JUROR: I'm a housewife.

16 THE COURT: Okay. And do you ever shop at Walmart?

17 THE JUROR: Yes.

18 THE COURT: Where do you go to the -- Ahoskie?

19 THE JUROR: Ahoskie, yes.

20 THE COURT: What do you shop for there?

21 THE JUROR: Groceries. I eat a lot of vegetables,  
22 so I'm there twice a week. I mean, we buy clothes,  
23 sports-type clothes, workout clothes, that kind of stuff.

24 THE COURT: Do you have a grill --

25 THE JUROR: Yes.

1 THE COURT: -- at home?

2 THE JUROR: Yes.

3 THE COURT: Is it a charcoal or a gas grill?

4 THE JUROR: I have a gas and a charcoal. And a fry  
5 pot, too.

6 THE COURT: Are they brand names?

7 THE JUROR: No.

8 THE COURT: Where did you buy all those?

9 THE JUROR: Lowe's.

10 THE COURT: At Lowe's, okay. So what's the -- is  
11 there any sort of trademark on the gas grill?

12 THE JUROR: I really don't know. I just look more  
13 for durability, because I don't buy stuff like that very  
14 often so I want to make sure it's good quality stuff.

15 THE COURT: You want it to last.

16 THE JUROR: Yes.

17 THE COURT: Have you ever bought -- have you been  
18 to Roses ever?

19 THE JUROR: Yes.

20 THE COURT: Where do you go to Roses?

21 THE JUROR: Ahoskie.

22 THE COURT: There's a store there?

23 THE JUROR: Yes.

24 THE COURT: And what do you buy at Roses?

25 THE JUROR: Casual clothes, stuff to hang on the

1 walls and personal items, hair stuff.

2 THE COURT: Would you ever consider buying a grill  
3 at Roses?

4 THE JUROR: No.

5 THE COURT: Thank you.

6 Ms. Riche, where do you live?

7 THE JUROR: We live in Carova on the Outer Banks.

8 THE COURT: All the way up --

9 THE JUROR: Just about.

10 THE COURT: Okay. Because the road stops  
11 somewhere, right?

12 THE JUROR: Yes, it does.

13 THE COURT: It stops after the village or --

14 THE JUROR: After the village, yes. Carova.

15 THE COURT: And then you're on sand, you're on the  
16 Currituck Wildlife Refuge that everybody comes here if they  
17 get in trouble for. See, we have jurisdiction over all the  
18 national seashores and Park Service and Fish & Wildlife and  
19 that sort of thing. So it's always been a curiosity to me  
20 about the people who were above the paved road how they knew  
21 that they were going to get home because the ocean doesn't  
22 have a green light and red light on it.

23 THE JUROR: That's correct. You have to watch the  
24 tides very carefully.

25 THE COURT: Yeah, they got to drive on the hard

1 pack, and sometimes the hard pack isn't there.

2 THE JUROR: That's correct.

3 THE COURT: But how long have you lived up there?

4 THE JUROR: Five years.

5 THE COURT: Okay. And so is a Walmart or Roses  
6 accessible to you? You're sort of out of the way.

7 THE JUROR: The Walmart is about 15 miles or so.

8 THE COURT: Where is that, in Virginia?

9 THE JUROR: Kitty Hawk. The one and only.

10 THE COURT: You come down highway 12 --

11 THE JUROR: Yes.

12 THE COURT: -- and you shop there?

13 THE JUROR: Once a month or so.

14 THE COURT: What do you get there?

15 THE JUROR: Personal products, holiday stuff,  
16 craft-type stuff.

17 THE COURT: Have you ever bought a grill or outdoor  
18 equipment there?

19 THE JUROR: Not there, no.

20 THE COURT: Where would you buy them?

21 THE JUROR: We bought our grill from Lowe's.

22 THE COURT: And how about a Variety or Roses, do  
23 you ever shop there?

24 THE JUROR: No. I don't even know where one would  
25 be. Yeah.

1           THE COURT:   So to your knowledge, you've never been  
2   in a Roses?

3           THE JUROR:   Correct.

4           THE COURT:   Mr. Harmon -- I'm sorry, Ms. Bond,  
5   where are you from, ma'am?

6           THE JUROR:   Windsor, North Carolina.

7           THE COURT:   And what do you do for a living?

8           THE JUROR:   I'm a fraud investigator for Bertie  
9   County.

10          THE COURT:   Social services?

11          THE JUROR:   Yes, sir.

12          THE COURT:   And do you ever shop at Walmart?

13          THE JUROR:   Yes, I do.

14          THE COURT:   Where do you go, to Ahoskie or  
15   Williamston?

16          THE JUROR:   I've been to Ahoskie, but the one I go  
17   to the most is Williamston.

18          THE COURT:   That's the closest one for you?

19          THE JUROR:   Yes.

20          THE COURT:   How often do you go?

21          THE JUROR:   About once a month -- once every  
22   two months.

23          THE COURT:   What do you buy when you go to Walmart?

24          THE JUROR:   Just various things.   Mostly I'm  
25   looking for a deal.

1           THE COURT: Yeah. Do you ever buy hardware  
2 products like a grill or chairs or tables or outdoor  
3 merchandise?

4           THE JUROR: I have bought a grill from there. It's  
5 been several years ago.

6           THE COURT: From -- you bought a grill at Walmart?

7           THE JUROR: Yes, sir.

8           THE COURT: Was it charcoal or gas?

9           THE JUROR: It was charcoal.

10          THE COURT: And do you remember what it was called,  
11 what the brand was?

12          THE JUROR: It was on sale for 20 bucks.

13          THE COURT: Okay. So it was a small one, not a  
14 hood -- it was one that you take the top off -- it had a  
15 hood?

16          THE JUROR: No. Just take the top off and set it  
17 here.

18          THE COURT: Put the charcoal in, put the lighter  
19 fluid in and there you are.

20          THE JUROR: Yes.

21          THE COURT: How about Roses, do you shop there at  
22 all?

23          THE JUROR: I go there also.

24          THE COURT: Do you go to one more than the other?

25          THE JUROR: No. I mean, I'm just -- when I go, I

1 have specific things in mind for a deal, and if it's in my  
2 category of how much money I want to spend, then that's where  
3 I end up buying something from.

4 THE COURT: Do you go other places like the Dollar  
5 Store and Dollar General?

6 THE JUROR: Yes. I go there also for the same  
7 reason, for that set amount of money that I want to spend.

8 THE COURT: Okay. Thank you.

9 Mr. Harmon, where do you live?

10 THE JUROR: Windsor.

11 THE COURT: And what do you do for a living?

12 THE JUROR: Drive a log truck and I run the loader  
13 for Ray Bateman in Edenton.

14 THE COURT: Run a what?

15 THE JUROR: I drive a truck and run the loader for  
16 Ray Bateman out of Edenton.

17 THE COURT: What's the last thing you said, out of  
18 Edenton? Ray Bateman?

19 THE JUROR: Yes.

20 THE COURT: He's a logger.

21 THE JUROR: He's a logger, yes. I run the loader  
22 for him and drive the truck for him.

23 THE COURT: So the loader is a stationary piece of  
24 equipment that puts the logs on the truck?

25 THE JUROR: Yes.



1           THE COURT:   Then you're also able to drive the  
2 truck?

3           THE JUROR:   Yes.

4           THE COURT:   And you work in the log woods 50 miles  
5 around this area.

6           THE JUROR:   Working for James, you work everywhere.

7           THE COURT:   How far do you go?   Do you go down to  
8 Little Washington or below that?

9           THE JUROR:   We go back up towards Jackson,  
10 Wellville, places like that.

11          THE COURT:   And where do you unload the logs?

12          THE JUROR:   Usually Ahoskie.

13          THE COURT:   Warehouses there?

14          THE JUROR:   No.   That's in Greenville.

15          THE COURT:   What's that?

16          THE JUROR:   In Greenville.

17          THE COURT:   And do you ever go to Walmart?

18          THE JUROR:   Yes.   About once a month, something  
19 like that.

20          THE COURT:   And what do you buy there?

21          THE JUROR:   Just what I need.   When I go in the  
22 store I know what I'm getting.   I go there, I don't shop  
23 around, I just go get what I need.

24          THE COURT:   Do you own a grill?

25          THE JUROR:   Yes.

1 THE COURT: What kind of grill, gas --

2 THE JUROR: It's a Master Grill, a charcoal grill.

3 THE COURT: Is that the name, Master Grill?

4 THE JUROR: Yeah.

5 THE COURT: Where did you buy that?

6 THE JUROR: My neighbor gave it to me, bought it  
7 from Lowe's.

8 THE COURT: Okay. Thank you.

9 Have any of you ever been a juror in a case where  
10 it was a civil or criminal case?

11 (No affirmative response)

12 THE COURT: State or federal court?

13 (Two juror hands raised)

14 THE JUROR: I have, too.

15 THE COURT: Ms. Dent, where was that?

16 THE JUROR: Winton, North Carolina.

17 THE COURT: In Hertford County.

18 THE JUROR: Um-hum.

19 THE COURT: What kind of case was it?

20 THE JUROR: It was a murder case.

21 THE COURT: A murder?

22 THE JUROR: A murder case, um-hum.

23 THE COURT: That wouldn't affect you in this case,  
24 would it?

25 THE JUROR: No.

1 THE COURT: How about you, Ms. Cahoon?

2 THE JUROR: I served as a juror in Terrell County  
3 on a DWI case.

4 THE COURT: Raise your hand if you have a college  
5 degree.

6 (Jurors responding affirmatively)

7 THE COURT: Keep your hands up. One, two, three,  
8 four, five. Okay. Raise your hand if you have a  
9 postgraduate college degree or education.

10 (Jurors responding affirmatively)

11 THE COURT: One, two. Okay.

12 Raise your hand -- obviously not the people who  
13 have college degrees, but if you didn't raise your hand for  
14 that, if you have a high school diploma.

15 (Jurors responding affirmatively)

16 THE COURT: Okay. Thank you very much.

17 Let me see the lawyers from each side up here.

18 **BENCH CONFERENCE**

19 (On the Record)

20 MS. GARKO: Good morning, your Honor.

21 THE COURT: I'm just telling you you're going to  
22 get three strikes on each side. And the way mechanically  
23 it's done is you have the odd numbers one, three and five and  
24 you have two, four and six. What we'll have left, if it  
25 works as planned, are eight jurors and that will be your

1 trial jury.

2 MR. ADAMS: And, your Honor, do we say this out  
3 loud or do we bring a piece of paper up to you --

4 THE COURT: You do it here quietly so that no one  
5 knows who struck who.

6 MR. ADAMS: Okay.

7 THE COURT: Thank you.

8 (Conclusion of Bench Conference)

9 (Open Court)

10 THE COURT: Take as much time as you need.

11 Any of you been in this room before? It's been  
12 here since 1903. I haven't been here since 1903. Almost.  
13 And the main post office in Elizabeth City was downstairs,  
14 but the Postal Service closed that about 15 years ago or 12  
15 years ago and they have a much less impressive building on  
16 Ehringhaus Street. That's the post office.

17 But this used to be the business center of the  
18 community. Everybody came here to get their boxes, their  
19 mail and deliver mail, and upstairs was this room -- I've  
20 been here since 1984. That guy up there on the corner was  
21 here from 1925 to '45. Between '45 and '84 there wasn't any  
22 judge here. Still had judges, but there weren't that many.

23 This guy up here, he was appointed by Thomas  
24 Jefferson and he served for 55 years, and he was the only  
25 United States judge in North Carolina for 55 years. The

1 whole state. So there wasn't a lot to do.

2           These guys -- that guy over there, he was from  
3 Elizabeth City. He served from 1865 to 1882 and he was the  
4 only judge in the state. Then around the 1870s, the Congress  
5 created two districts for North Carolina. So there was a  
6 judge in the west and a judge in the east. I can't imagine  
7 how they traveled. I guess they had a railroad and ferry  
8 boats and things like that, but...

9           There's still only three judges now. I'm here and  
10 there's one in Raleigh and one in New Bern. And there's a  
11 retired judge in Greenville and another one in Raleigh. Most  
12 of what we do is criminal trials, although every now and then  
13 there's a civil trial like this, but criminal trials you have  
14 to do them in a short amount of time. There's a  
15 constitutional requirement that you have a speedy trial and  
16 so that takes precedence over most other things.

17           MS. GARKO: Your Honor, may I approach with a  
18 request about the process briefly?

19           THE COURT: You want to approach?

20           MS. GARKO: Yes, your Honor.

21                   **BENCH CONFERENCE**

22                   (On the Record)

23           MS. GARKO: If we elect not to use all of our  
24 peremptory challenges, will you seat more than eight jurors  
25 or are you only intending to seat eight jurors?

1           THE COURT: That presents the choice on my part  
2 that I might take yours off for you. I wouldn't risk doing  
3 that.

4           MS. GARKO: Okay. So it will just be whatever  
5 number it ends up being if they aren't all used.

6           THE COURT: The whole idea -- not to give you a  
7 tutorial. You don't need it, you're all good lawyers, but  
8 there's bound to be someone left who you think is less  
9 favorable than someone else. That it's well known that the  
10 jury selection is you're taking the people you can't try the  
11 case to off. You're not looking for friends, you're avoiding  
12 enemies.

13          MS. GARKO: I understand, your Honor.

14          THE COURT: So --

15          MS. GARKO: We wanted to understand the outcome if  
16 we used two challenges instead of all three.

17          THE COURT: I'm intending to try it to eight  
18 people.

19          MS. GARKO: Okay.

20          THE COURT: So why give to me the strike when you  
21 can keep it for yourself.

22          MS. GARKO: Okay. Thank you. We wanted to  
23 understand it.

24          MR. ADAMS: Your Honor, I did have one question.  
25 There's a couple of additional questions we would like to

1 ask.

2 THE COURT: About what?

3 MR. ADAMS: Can we bring them up to you? Basically  
4 we would like to know if any of the jurors have relatives  
5 that work for either Roses --

6 THE COURT: That's a good question. I'll ask that.

7 MR. ADAMS: Also there was one question about Ms.  
8 Cahoon who worked for the soybean company. We would like to  
9 know if her company owns any trademarks.

10 THE COURT: Okay. Yes. I'll definitely ask that.

11 MS. GARKO: Thank you, your Honor.

12 (Conclusion of Bench Conference)

13 (Open Court)

14 THE COURT: Do any of you have family members or  
15 people that you're connected to in some way who are employees  
16 of either Walmart or Roses? Like, does your husband or your  
17 child work at one of those stores or have they worked there  
18 in the past? Yes, sir, Mr. Grogan.

19 THE JUROR: Yes, sir. My children worked there  
20 when they went through college.

21 THE COURT: Worked at Walmart?

22 THE JUROR: Yes, sir.

23 THE COURT: Okay. And how long ago was that?

24 THE JUROR: At least 20 years ago.

25 THE COURT: Okay. What did they do?

1           THE JUROR: One daughter worked in the vision  
2 center and the other was just a clerk.

3           THE COURT: Okay. And where were these stores?

4           THE JUROR: Pennsylvania.

5           THE COURT: Okay. Anyone else have any family  
6 experience? Ms. Bond.

7           THE JUROR: My son -- he was in college and the one  
8 in Greensboro. One of the ones in Greensboro.

9           THE COURT: What did he do there?

10          THE JUROR: Cashier.

11          THE COURT: He was at a Walmart?

12          THE JUROR: Yes.

13          THE COURT: Anyone else?

14                       (No affirmative response)

15          THE COURT: Thank you. Ms. Cahoon, your company,  
16 how long did you say you worked for them?

17          THE JUROR: Four years.

18          THE COURT: Four years.

19                       Do they sell products to purchasers under a brand  
20 name? Do they have a trademark or a brand name?

21          THE JUROR: They have -- Cherry Farms has their own  
22 seed.

23          THE COURT: Cherry Farms.

24          THE JUROR: Right.

25          THE COURT: C-H-E-R-R-Y?



1 THE JUROR: Yes. They have their own wheat.

2 THE COURT: Their own brand that --

3 THE JUROR: Yes.

4 THE COURT: It's packaged and marketed with their  
5 label on it?

6 THE JUROR: Yes.

7 THE COURT: Okay. And Cherry is an actual physical  
8 place in that part of the world and it's also a name. I  
9 mean, your last name might be Cherry.

10 THE JUROR: Right. The man who -- his last name is  
11 Cherry who started Cherry Farms.

12 THE COURT: But there's also a place in Terrell or  
13 Washington.

14 THE JUROR: Washington County.

15 THE COURT: Called Cherry.

16 THE JUROR: Correct.

17 THE COURT: It's a little village, crossroads.

18 THE JUROR: Correct.

19 THE COURT: Okay.

20 MR. ADAMS: We're ready, your Honor.

21 THE COURT: Are you ready?

22 MS. GARKO: We are, your Honor.

23 BENCH CONFERENCE

24 (On the Record)

25 THE COURT: All right. There are no challenges for

1 cause that the Court has found, so the first strike is with  
2 the plaintiff.

3 MR. ADAMS: The plaintiff will strike number two,  
4 Mr. Grogan.

5 THE COURT: Defendant.

6 MS. GARKO: Defendant strikes number three.

7 THE COURT: Three?

8 MS. GARKO: (Nodding head).

9 THE COURT: You're next.

10 MR. ADAMS: Oh. Actually, I misunderstood. I  
11 thought we would go back after the first pair and then come  
12 back.

13 THE COURT: So I said you had one, three and five.  
14 If you want a moment to go back --

15 MR. ADAMS: Let me get my chart.

16 THE COURT: Yes.

17 (Attorneys Adams and Garko returned to counsel table to  
18 confer with counsel off the record)

19 THE COURT: Have any of you ever owned, either  
20 personally or in your family or business, a trademark? Have  
21 you ever had -- gone through the process of registering a  
22 federal trademark?

23 (No affirmative response)

24 THE COURT: All right.

25 (Attorneys Adams and Garko returning to the bench)

1 THE COURT: Your turn.

2 MR. ADAMS: Plaintiff strikes number three, Mr.  
3 Twiddy.

4 THE COURT: Which one?

5 THE JUROR: Mr. Twiddy. Three.

6 THE COURT: I didn't get it again. Four -- point  
7 to it.

8 (Attorney Adams pointing to juror number three, Mr. Twiddy,  
9 on the jury panel sheet)

10 MS. GARKO: Juror number ten.

11 THE COURT: Who is your last --

12 MR. ADAMS: Ms. Gunia, number seven.

13 MS. GARKO: Number nine.

14 THE COURT: Wilson?

15 MS. GARKO: Yes.

16 THE COURT: Okay. Thank you.

17 (Conclusion of Bench Conference)

18 (Open Court)

19 THE COURT: The following persons are excused.

20 Don't get up yet. You can be processed out after we take a  
21 recess.

22 Mr. Grogan, Ms. Carr, Mr. Twiddy, Ms. Gunia, Mr.  
23 Neithamer and Ms. Wilson. You're excused and don't have to  
24 return. Thank you for being here and thank you for your  
25 service.

1           The other jurors are also going to be excused. The  
2 people whose names I didn't call will be taken to the jury  
3 room and when you come back in you'll be sworn and we'll  
4 begin the opening statements and the trial. We'll be in  
5 recess at this point.

6                   (Recess at 11:17 a.m. to 11:33 a.m.)

7                           (Open Court)

8                           (No jury present)

9           THE COURT: It's my opinion that the Fourth  
10 Circuit's ruling makes binding five of the nine factors in  
11 determining likelihood of confusion and that -- let's see.  
12 They found that three, four, five, eight and nine favored the  
13 plaintiff; that there is an issue of fact on one, two, six  
14 and seven. And that will be the law of the case in terms of  
15 this trial.

16           And I'm not going to submit an issue of damages or  
17 have evidence on damages because I spent a lot of time on  
18 damages and the Fourth Circuit reversed on the question of  
19 fact on liability. So I'm convinced that the appropriate way  
20 to handle this is to try the liability issue, stop, let you  
21 go to the Fourth Circuit, whichever way it goes, they're  
22 going to want to rule on it again, and then come back.

23           And I think that the equitable disgorging of  
24 profits that I ruled on wasn't reversed by the Fourth  
25 Circuit, but it wasn't affirmed by the Fourth Circuit. And

1 as a matter of judicial economy and -- I would hold that that  
2 is still binding if the plaintiff wins. If the plaintiff  
3 loses and the Fourth Circuit affirms that, then it's all  
4 gone.

5 So I don't know if you expected this, but that's  
6 the way I'm inclined to try the case and present it to the  
7 jury. It will be a more compact and manageable case and  
8 these jurors, you've seen them, they'll give you whatever the  
9 right answer is.

10 MR. PUZELLA: Your Honor, I understand your ruling.  
11 I'm not challenging it. I just would like to make the record  
12 clear.

13 THE COURT: Absolutely. Because you'll be reading  
14 it in the red room in Richmond.

15 MR. PUZELLA: Exactly. Walmart's position is that  
16 the Fourth Circuit vacated the entire summary judgment order.  
17 Each of the elements in the likelihood of confusion test were  
18 a part of that opinion that was reversed and this trial  
19 should address all of the likelihood of confusion elements in  
20 part not just because of the vacation of the order, but  
21 because the elements require a weighing of one another and  
22 there's no indication in the Fourth Circuit opinion as to the  
23 degree to which particular elements weigh in favor of the  
24 plaintiff or in favor of the defendant. So the jury is going  
25 to be hamstrung in their ability to weigh the nine factors.

1 It's not as simple as a factor is in plaintiff's favor versus  
2 in defendant's favor because of Variety at issue three.

3 So our view is that the entire case should be put  
4 on likelihood of confusion.

5 And then with respect to damages, arguing similarly  
6 that every order following the summary judgment order was  
7 also vacated and as a result, this trial ought to consider  
8 those issues as well. But I understand the Court's order. I  
9 just wanted to have the record reflect our position.

10 THE COURT: Well, even if you're correct about the  
11 damage issue, I'm going to bifurcate it and we'll try the  
12 liability only here. It's wasteful any way you cut it to try  
13 damages and then have it reversed in the Court of Appeals.

14 How about the plaintiff?

15 MR. ADAMS: May I, your Honor?

16 Obviously, I disagree with Walmart. The Fourth  
17 Circuit was very clear. They used the word "waive" expressly  
18 so really no need to discuss that. I'm not sure I understood  
19 your Honor correctly though about damages, which of course  
20 involves both the disgorgement of the profits issue and the  
21 more formal damage issue, which in our case is the seeking of  
22 a reasonable royalty. Am I correct that this is strictly  
23 just going to be on liability?

24 THE COURT: Yes.

25 MR. ADAMS: You're not going to re-enter or enter a

1 further judgment on the disgorgement issue again?

2 THE COURT: No. I mean, the only way we get to  
3 damages here without going through the Fourth Circuit is for  
4 both sides to come to some agreement after a jury verdict.

5 MR. ADAMS: I understand. I just wanted to make  
6 sure. We're using the term "damages." You were using it in  
7 the sense of profits disgorgement and the more formal damages  
8 type. So that's fine.

9 THE COURT: I'm not going to paint myself into a  
10 corner. I'm not sure that I agree with that, but I do agree  
11 that damages are not going to be presented to the jury in  
12 this case.

13 MR. PUZELLA: Your Honor, just so we're clear,  
14 we're only addressing liability, the question of a likelihood  
15 of confusion between the two parties' products.

16 THE COURT: Yes.

17 MR. PUZELLA: Does that include in the Court's  
18 judgment the issue of causation?

19 THE COURT: What does that mean?

20 MR. PUZELLA: The issue of whether Walmart's use of  
21 Backyard Grill caused any harm to Variety or there's a link  
22 between the use of Backyard Grill by Walmart in its sales.  
23 Is that in this trial or out of this trial?

24 THE COURT: I'm sorry to be simple. Give me that  
25 again.

1           MR. PUZELLA: Sure. So I conceptualize there being  
2 three issues in a trademark case. There's the question of  
3 liability, which typically includes whether the mark is  
4 valid.

5           THE COURT: What are we trying to --

6           MR. PUZELLA: I just want to understand what we're  
7 doing, that's all.

8           THE COURT: So do I.

9           MR. PUZELLA: Right. I conceptualize a trademark  
10 case as having three main parts. One, on the liability side,  
11 whether the marks are valid and whether they've been  
12 infringed.

13          THE COURT: Well, one of the marks is  
14 incontestable.

15          MR. PUZELLA: Correct. And two that they also  
16 claim are not registered, and our position is they're  
17 descriptive and plaintiff has the burden of showing secondary  
18 meaning in order for them to be protectable. So there's the  
19 issue of validity and the issue of likelihood of confusion.  
20 That's liability. I understand your Honor to say that that  
21 is in this case now and for present purposes.

22          Next --

23          THE COURT: The protected one is The Backyard.

24          MR. PUZELLA: Correct. For lawn and garden  
25 equipment.



1           THE COURT: Correct. The other two are The  
2 Backyard and Backyard Barbecue.

3           MR. PUZELLA: I understand their position to be  
4 Backyard standing alone and Backyard BBQ.

5           THE COURT: So three iterations of it.

6           MR. PUZELLA: Correct.

7           THE COURT: The Backyard, Backyard, and Backyard  
8 Barbecue are, according to the plaintiff, protected by use  
9 but not by registration.

10          MR. PUZELLA: The first by registration, the second  
11 two by use.

12          MR. ADAMS: I can answer for the plaintiff, your  
13 Honor. Our position has been consistent from day one. And  
14 this is consistent with the Fourth Circuit's law going back  
15 to Lone Star and Synergistic. In the Fourth Circuit, the  
16 scope of a trademark registration is not limited to just the  
17 literal words in the registration and the literal limitations  
18 of the goods and services description. Whether you're  
19 talking about it in terms of a shadow -- a halo or something,  
20 that that's exactly what the Fourth Circuit has said on  
21 numerous occasions.

22          So it is not the case, it is not the case that this  
23 case has two sets of trademarks, one that's registered and  
24 thereby protected and the other that's simply common law and  
25 therefore we're required to show some type of secondary

1 meaning. I think we can do that anyway, but before we go  
2 down that road we need to take a careful look at Lone Star  
3 and Synergistic and some of the other case law. The  
4 defendant is just dead flat wrong on that issue.

5 However, there is one other issue that I can  
6 mention and that is that Walmart has stipulated that our  
7 trademark registration is valid. That's a stipulation that's  
8 not in controversy here. Secondly, there's an issue of  
9 willfulness. And that's going to have to be a separate issue  
10 to the jury because that will depend substantially on the  
11 type of relief that's afforded and the standard by which the  
12 Court determines what that relief is.

13 If your Honor wants to bifurcate the trial, that's  
14 fine with us. It was going to be -- there was going to be an  
15 appeal anyway so --

16 THE COURT: There's going to be an appeal from  
17 everything. I mean, that's the nature of the beast, and it's  
18 just as confusing and indefinite as it can be, and so what  
19 are we doing here? I mean, you know, you want me to give  
20 summary judgment again and you can race back to Richmond and  
21 get it flipped? I'm looking for closure and neither of you  
22 appear to be interested in closure.

23 MR. PUZELLA: Your Honor, I'm interested in  
24 closure. My only question before we got on the side road was  
25 what's in. We're ready to go. If it's just liability and

1 validity, that's the case we'll put on. We're happy to do  
2 that. I only ask whether causation is in this trial or not.  
3 If it's not, it's not. I understand you to have said that  
4 damages are not.

5 MR. ADAMS: The issue I have is the issue with  
6 validity.

7 MR. PUZELLA: And I think I can clarify that.

8 MR. ADAMS: Validity is not in this case. They've  
9 stipulated that our trademark registration is valid and the  
10 case law in the Fourth Circuit is quite clear that the --

11 THE COURT: If I can't understand what you're  
12 doing, how do you expect these eight people who went to the  
13 tenth grade to understand it? I mean, this trial is just in  
14 vain.

15 MR. PUZELLA: Understood, your Honor.

16 THE COURT: It's a lottery.

17 MR. PUZELLA: I think we're talking past each  
18 other. Walmart does not challenge that Variety's trademark  
19 registration for lawn and garden equipment is valid. We  
20 stipulated to as much. But Variety claims two other common  
21 law marks. If they would like to abandon those and only  
22 present the case on the registered mark we can do that. But  
23 to the extent they claim two other marks, they need to prove  
24 ownership in those two other marks. It's plaintiff's choice.

25 MR. ADAMS: If Mr. Puzella is right, we've been

1 using those other two marks since 1993, so that's not in  
2 controversy either.

3 MR. PUZELLA: Yes, it is, your Honor.

4 MR. ADAMS: We're here to try the case your Honor  
5 wants to try.

6 THE COURT: I don't want to try a case at all. And  
7 my frustration is going to be communicated to the jurors.  
8 And so you'll end up with the case reversed and sent back  
9 again. I've had this happen. And it's not pretty. And, I  
10 mean, your billing goes up because it goes into perpetuity  
11 and you both have deep-pocket clients so they don't care.  
12 And I mean, go back and look at the Georgia-Pacific trademark  
13 case that went up and down and up and down and up and down  
14 and they ended up with the Supreme Court litigators at the  
15 last end. You know, we can do that. We can do that.

16 Okay. We'll bring the jury in.

17 MR. HOSP: Your Honor, if I may, there are a couple  
18 of issues that I think we may put out in the opening that we  
19 have motions on. In particular, there's a privilege issue  
20 where -- it's my understanding that the plaintiff intends to  
21 ask questions directed deliberately to try to force Walmart  
22 to assert a privilege. We don't believe that's appropriate.  
23 I raise it now in particular only because it's my  
24 understanding based on the slides that we've gotten and the  
25 presentation that we understand is going to be delivered in

1 the opening that there's actually going to be an excerpt of a  
2 transcript --

3 THE COURT: Oh, yeah, and I'm going to impose time  
4 limits on the trial. I'm thinking of how to do that. Like  
5 two days for each side. And it can be done. I mean, you can  
6 take it up. You can try to mandamus me in the middle of the  
7 trial, whatever. The prospect of this taking on a life of  
8 its own is not something I want to be a part of.

9 MR. HOSP: Yes, your Honor.

10 MR. PUZELLA: Your Honor, if the case is just  
11 liability we can do that in two days. No problem.

12 THE COURT: Okay. I mean, I'm not going to -- like  
13 if you're really doing a great job, I'm going to shut up and  
14 get out of your way. But if this is rope-a-dope where  
15 everybody's in there just to drag it out and take minor  
16 concessions, then I'm going to start talking to the jury and  
17 you'll end up with a bad outcome for everyone.

18 So don't worry about it. Just -- you made all your  
19 motions and I've denied them all. We'll see how it goes.  
20 I'm just going to be part of the audience and -- anyway.

21 MR. ADAMS: Your Honor, may I make a suggestion.  
22 This may be true for Walmart as well. In view of your  
23 Honor's order, I'm going to need to revise my opening  
24 statement somewhat, so I'm suggesting maybe we break for  
25 lunch now and let us do that during lunch and then come back.

1           THE COURT:   Okay.   Anything to move it along.  
2   No, here's what we're going to do.   Bring the jury in, swear  
3   the jury in, give my preliminary instructions and then send  
4   them to lunch and you can come back at 1:30 and start.

5           Bring the jury in.

6                       (Jury panel in at 11:51 a.m.)

7           THE COURT:   All right.   Swear the jury.

8           THE CLERK:   Please stand and raise your right hand.

9                       (Jury panel sworn by the deputy clerk)

10                      (All jurors respond affirmatively)

11          THE CLERK:   Thank you.   You may be seated.

12                               **PRELIMINARY JURY INSTRUCTIONS**

13                              (by The Court)

14           Ladies and gentlemen, you've been sworn as the jury  
15   in this case.   I'll give you some preliminary instructions to  
16   guide you in your participation during the trial.

17           It will be your duty to find from the evidence what  
18   the facts are.   You and you alone are the judges of the  
19   facts.   You will then have to apply those facts to the law.  
20   The Court will give you instructions on the law.   You have to  
21   follow the law whether you agree with it or not.

22           Nothing that I say or do during the course of the  
23   trial is intended to indicate, nor should it be taken by you  
24   as indicating what your verdict should be.   The evidence from  
25   which you will find the facts will consist of the testimony

1 of witnesses, documents and other things received into the  
2 record as exhibits, and any facts that the lawyers agree or  
3 stipulate to or that the Court instructs you to find.

4 Certain things are not evidence and should not be  
5 considered by you. I'll list these for you. First the  
6 statements, arguments and questions by the lawyers are not  
7 the evidence in the case. Objections to questions are not  
8 evidence. Lawyers have an obligation to their client to make  
9 an objection when they believe evidence is being offered that  
10 is not admissible under the Rules of Evidence. You should  
11 not be influenced by the objection or by the Court's ruling  
12 on it. If the objection is sustained, ignore the question.  
13 If it's overruled, treat the answer as you would any other.

14 If you are instructed that some item of evidence is  
15 received for a limited purpose only, you have to follow that  
16 instruction. Testimony that the Court has excluded or tells  
17 you to disregard is not evidence and must not be considered.  
18 Finally, anything you have seen or heard outside of the  
19 courtroom is not evidence and must be disregarded. You are  
20 to decide the case solely on the evidence presented here in  
21 court.

22 Generally speaking, there are two kinds of  
23 evidence, direct evidence and circumstantial evidence.  
24 Direct evidence is proof of a fact such as the testimony of  
25 an eyewitness. Circumstantial evidence is proof of facts

1 from which you may infer or conclude that other facts exist.  
2 I will give you further instructions on these as well as  
3 other matters at the end of the case, but bear in mind that  
4 you may consider both kinds of evidence.

5 It will be up to you to decide which witnesses you  
6 believe and which witnesses you do not believe and how much  
7 of any witness's testimony you accept or reject. I'll give  
8 you guidelines for determining the credibility of witnesses  
9 at the end of the case.

10 This is a civil case. The plaintiff in the case,  
11 Variety, has the burden of proving its case by what is called  
12 a preponderance of the evidence. That means that the  
13 plaintiff has to prove evidence which, when considered in  
14 light of all the facts, leads you to believe that what the  
15 plaintiff claims is more likely true than not true. To put  
16 it differently, if you were to put plaintiff and defendant's  
17 evidence on opposite sides of the scale, plaintiff would have  
18 to make the scale tip somewhat to its side. If the plaintiff  
19 fails to meet this burden, the verdict must be for the  
20 defendant.

21 If you have been aware of criminal cases, you will  
22 have heard that the standard of proof there is proof beyond a  
23 reasonable doubt. That requirement does not apply to a civil  
24 case and should be put out of your consideration in this  
25 case.



1           In this case, the plaintiff claims that the  
2 plaintiff has trademarks that are protectable and that there  
3 is a likelihood of confusion in the defendant's marketing of  
4 products using trademarks that the plaintiff claims interfere  
5 or impinge on its trademark. You will hear a great deal  
6 about this during the case and I will give you instructions  
7 on the rules of law at the end of the case.

8           During the trial you're not to discuss the case  
9 with anyone or permit anyone to discuss it with you. Until  
10 you retire to your jury room at the end of the case to  
11 deliberate on your verdict, you're not to talk about the  
12 case. Don't read or listen to anything about the case in any  
13 way. If anyone tries to talk to you about it, bring it to  
14 the attention of one of the court officials and they'll bring  
15 it to my attention.

16           Do not try to do any research or make any  
17 investigation about the case on your own.

18           And finally, you're not to form any conclusive  
19 opinion until all of the evidence has been received. Keep an  
20 open mind until you start your deliberations at the end of  
21 the case.

22           If you want to make notes, you can. If you do,  
23 they're for your own personal use. Leave them in the jury  
24 room when you're away. Remember these are not to be shown or  
25 given to anyone.

1           The trial will begin after our lunch recess. Each  
2 side at the beginning may make an opening statement. This  
3 opening statement is neither evidence nor is it an argument.  
4 It's an outline of what that side of the trial intends to  
5 prove. It's offered to help you follow the evidence.

6           After the opening statements the plaintiff will  
7 present witnesses and the defendant may cross-examine these.  
8 The defendant will then present witnesses if it so chooses  
9 and the plaintiff may in turn cross-examine these. After all  
10 of the evidence has been presented, the attorneys will appear  
11 before you and make their closing arguments to summarize and  
12 interpret the evidence for you and I will give you  
13 instructions on the law. You will then go to your jury room  
14 to arrive at a verdict.

15           That's an outline of how a federal civil jury trial  
16 will develop and I think if you pay attention, you'll see it  
17 follow that course.

18           At this point, we will recess for lunch until 1:20  
19 and come back then and begin the opening statements. Court  
20 will be in recess for that time.

21           (Lunch recess at 11:50 a.m. to 1:25 p.m.)

22           THE COURT: Good afternoon, ladies and gentlemen.

23           The jury can be with the plaintiff for opening.

24       ///

25       ///

## OPENING STATEMENT

(By Mr. Adams)

Good afternoon. My name is Thad Adams, and I have the privilege of representing the plaintiff in this case. I would like to briefly introduce to you the other members of the team. Ms. Christina Trimmer, Mr. Scott Shaw, Mr. Alex Long and a paralegal, Ms. Cecelia Sidebottom, will be here in just a few short minutes.

This case is about Walmart's dishonesty and arrogance in stealing valuable property that belonged to the plaintiff in this case, Roses Stores, now owned by Variety Stores. This valuable property is Variety's Backyard trademark. So this case is about trademarks, as you heard your Honor say, and it should be an easy one for you because you are all trademark experts.

By that, I simply mean that probably before you were able to read or write, you could point to the Tony the Tiger and tell your parents that you wanted Frosted Flakes, or the silly bird on the Fruit Loops, that you wanted Fruit Loops. As you got older, you may have started using trademarks to purchase particular brands of clothing and shoes. And so there are trademarks that you're exposed to every day. Some people prefer Coca-Cola to Pepsi. Beechnut to Wrigley. Exxon to Mobil. Crest or Colgate. All these choices require that you use trademarks. And you certainly

1 used the Walmart or Roses trademarks to determine where you  
2 shop based on the answers that you gave his Honor just a  
3 little while ago.

4           So Kellogg or Post cereal. Ford or Buick  
5 automobiles. Apple or Microsoft computers or smart phones.  
6 Hanes or Jockey T-shirts. McDonald's or Wendy's hamburgers.  
7 Imagine how difficult it would be if everything was sold in a  
8 plain white box so that the only thing you saw on the box was  
9 cornflakes or cereal or hamburger or just whatever the case  
10 may be.

11           The purpose of the trademark is to tell you where  
12 the product came from; in other words, who's standing good  
13 for this product that I'm paying my money for. And it works  
14 in two different ways, because a trademark allows you to pick  
15 and choose things that you like so that you can go back the  
16 next time and buy the same product, but they also serve a  
17 reverse purpose. If you don't like a product, the trademark  
18 gives you the privilege of making sure the next time you go  
19 back to purchase toothpaste or whatever it may be, you don't  
20 buy that product.

21           So trademarks really serve two purposes. First,  
22 they protect the investment the company makes in creating a  
23 unique way of identifying a product. So you can imagine how  
24 important is it that the company owns Crest for toothpaste.  
25 That brand has been around for 40, 50, maybe 60 years. That

1 obviously is a very important asset of the company.

2 And just as importantly, as I mentioned a moment ago, the  
3 trademark allows a customer to locate and select a specific  
4 brand of the product that she wants -- he or she wants to buy  
5 or doesn't want to buy.

6           You're exposed to a little R with a circle around  
7 it or a little TM dozens of times every day whether you  
8 notice it or not. Maybe after this trial you'll be noticing  
9 it more often. But those little circle Rs and little TMs,  
10 they mean something. They mean that the owner of the  
11 trademark is telling everyone to keep off. The R in the  
12 circle means that the trademark has been registered in the  
13 United States Patent and Trademark Office and only the  
14 trademark owner has a right to use that circle R. Exactly  
15 the way Variety did it. They have a circle R on their  
16 trademark.

17           Which brings us to the facts of this case. The  
18 dishonest, the willfully dishonest, deliberately dishonest  
19 way that Walmart has dealt with Variety's Backyard trademark.  
20 We have here a gentleman sitting just behind the rail who has  
21 worked with and for Variety Stores and Roses for decades. He  
22 was there when Roses created and registered The Backyard  
23 trademark. That gentleman is Mr. Tim Blackburn from  
24 Henderson, North Carolina, where Roses is located. He's the  
25 vice-president and general counsel of Variety Stores and its

1     Roses Stores subsidiary. And he will tell you with complete  
2     truthfulness how Walmart stole Roses' Backyard trademark.

3             Roses Stores, this was back before it was acquired  
4     by Variety, adopted and registered The Backyard trademark way  
5     back in 1993 as the trademark identifier originally for a  
6     department, a particular department in its store. Mr.  
7     Blackburn saw that Variety and Roses followed the law. It  
8     filed registration papers with the U.S. Government and the  
9     trademark office which examined, approved, and then granted a  
10    trademark certificate which you'll see during this trial that  
11    extends Variety's trademark protection throughout the entire  
12    United States. And it was so successful that Backyard very  
13    quickly became a trademark that's also applied to a wide  
14    variety of products sold only by Variety's Roses Stores. And  
15    just by way of one example, you see here on the left is a  
16    Roses grill. And on the right you see virtually the  
17    identical grill that is -- was sold in -- by Walmart. Both  
18    cases, the prominent aspect of the trademark is Backyard.

19            So Roses over a period of time expanded the use of  
20    its trademark to barbecue grills and accessories, patio  
21    tables and chairs, garden hoses, sprinklers, a whole host of  
22    things, umbrellas, and The Backyard trademark was prominently  
23    placed on these products -- all of these products to tell the  
24    public that Variety's Roses Stores owns The Backyard  
25    trademark. And this is one easy part of this case. Walmart

1 admits that Variety owns The Backyard trademark and that it's  
2 valid. It's not going to be an issue that you'll have to  
3 determine.

4           So Roses uses the circle R that I mentioned a few  
5 moments ago to advise the public of its trademark rights.  
6 Variety's Roses Stores use the investment in The Backyard  
7 trademark to sell many millions of dollars of grills and  
8 other products. It developed a good reputation over the  
9 years. So much so that some years ago another company wrote  
10 Roses and said we would like to buy your trademark. We like  
11 The Backyard trademark; we would like to buy it. Roses said  
12 no, thank you, and unlike Walmart, the other company did not  
13 go ahead and steal it anyway. They backed off.

14           More recently another company started using the  
15 trademark Backyard Traditions on barbecue grills, an  
16 infringement of Roses' Backyard trademark. Roses objected,  
17 the other infringer agreed to stop. And you'll hear Mr.  
18 Blackburn give testimony about those transactions and some  
19 others.

20           So in 2010 along comes Walmart. Walmart wanted to  
21 have its own brand of private label grills and accessories.  
22 It had been using a trademark called Mainstays,  
23 M-A-I-N-S-T-A-Y-S, on some grill-related products and wanted  
24 to change to a better trademark. So under the millions of  
25 possible trademarks that Walmart could have chosen, it chose

1 Backyard Barbecue as well as some others to consider for its  
2 new line of grills. Variety had been using Backyard Barbecue  
3 for many years. Walmart has refused to say where it got the  
4 idea for using The Backyard trademark. I doubt you'll hear  
5 that answer during this trial.

6 Walmart went to a huge amount of effort, many  
7 lawyers, a large brand team, several very expensive surveys,  
8 focus groups, brainstorming sessions, trademark searches,  
9 evaluations. This must have cost a huge amount of money and  
10 these searches turned up The Backyard trademark owned by  
11 Variety. So Walmart has known about Variety's Backyard  
12 trademark since the very beginning, long before it sold the  
13 first product branded with The Backyard trademark -- and  
14 Walmart admits this. Again, this is not in dispute.

15 Variety's Backyard trademark ranked high in  
16 Walmart's evaluation. Some of these surveys I just  
17 mentioned. Much higher than the Mainstays trademark that it  
18 had been using. And we know a few things about how Walmart  
19 decided to use The Backyard as its trademark. We know that  
20 Walmart's legal team made Walmart's brand team aware of Roses  
21 Backyard trademark. We also know that after at least two of  
22 these discussions Walmart decided not to use Backyard. Of  
23 course, in the end we know that Walmart used Roses' trademark  
24 anyway.

25 There are some things we don't know about Walmart's



1 decision to steal Roses' Backyard trademark, but nevertheless  
2 this is an easy case. This is not like a TV show. This is  
3 not like Matlock where you have two totally conflicting  
4 stories being told by the witnesses on the stand and Matlock  
5 or someone finally breaks down one of the witnesses and he  
6 confesses or she confesses and the whole thing is settled.  
7 No.

8 In this case, the relevant facts in this case are  
9 about Walmart's willful infringement, and these are Walmart's  
10 facts. Walmart's decision to ignore Variety's Backyard  
11 trademark and registration. Walmart's decision to use  
12 Backyard even after hearing twice not to use it, after  
13 discussions with their lawyers. Walmart's admission that it  
14 did not -- this is important. I'll start over again.  
15 Walmart's admission that it did not trouble itself to send  
16 anybody to even one Roses store to see how Roses was actually  
17 using its Backyard trademark. Not one person. Even though  
18 as you -- I'm sure you know from the questions, there are  
19 many Walmart stores and many Roses Stores that are very close  
20 together. It would have been a simple matter to send an  
21 assistant manager from a Walmart store down to Roses with the  
22 question, hey, check out their home section and let us know  
23 if they have any products that have their Backyard trademark  
24 on them. Simple 30-minute trip from one end of Elizabeth  
25 City to the other and back.

1           Here's another important fact. Walmart's decision  
2 to continue and even greatly increase its willful illegal use  
3 of Variety's Backyard trademark even after we found out about  
4 it and objected. And in fact, you'll learn from Mr.  
5 Blackburn that most of Walmart's infringing sales took place  
6 after we raised the objection that they were infringing our  
7 trademark.

8           This is going to blow you away. Walmart has sold  
9 almost 1 billion -- that's billion with a B -- infringements,  
10 in dollar value infringements of Roses' trademark. A billion  
11 dollars. And that's just over a four-year period. And  
12 again, this is not in dispute.

13           So Walmart is going to have at least ten witnesses  
14 here to try to explain to you why it should not be found  
15 guilty of trademark infringement. And what you're going to  
16 hear from Walmart from all of their witnesses are excuses.  
17 Excuses made up after the fact, after Walmart was found out  
18 and then they had to come up with something.

19           So let's match up some of Walmart's excuses with  
20 the actual facts that you're going to hear from Walmart's own  
21 witnesses. Remember, this is Walmart's evidence by and large  
22 you're going to be hearing. Of course you'll hear Mr.  
23 Blackburn tell about the history of The Backyard trademark  
24 from Roses' standpoint, but the relevant facts in this case  
25 are really the facts you'll hear from Walmart's witnesses.

1           So Walmart's going to tell you that they adopted  
2 and used The Backyard trademark in good faith. No. Walmart  
3 adopted and used Variety's Backyard trademark after they had  
4 discussions with their lawyers and the existence of The  
5 Backyard trademark had been brought to their attention.

6           Walmart didn't know -- this is another excuse --  
7 Walmart didn't know Variety was using Backyard on products  
8 such as grills. No. Walmart learned about Variety's  
9 trademark from its trademark lawyers long before it decided  
10 to use it. The fact that Variety used its Backyard trademark  
11 on various products like you see here is a matter of public  
12 record in the trademark office. Anyone who troubled  
13 themselves, and I'm sure Walmart's attorneys did, to go to  
14 the trademark office and look in the public files would see  
15 evidence of many products that Variety and Roses have been  
16 using on its products.

17           You'll also hear -- well, you probably will. I'm  
18 not so sure after the jury was selected, but you're going to  
19 hear -- you may hear that Variety is not a competitor of  
20 Walmart; in other words, that Walmart's business and Roses'  
21 business are unrelated to each other; that even if there were  
22 products both bearing the same trademark, that there would be  
23 no likelihood of confusion because their businesses are so  
24 separate and apart and -- that can't possibly be believed  
25 based on Walmart's own evidence. In fact, you'll hear a

1 Walmart witness testify that Variety is a competitor of  
2 Walmart. And as I've said earlier, many of Variety's stores  
3 and Walmart stores are very close together. So it's not  
4 surprising that someone might walk into a Walmart, for  
5 example, and see a Backyard grill and maybe a day or two  
6 later walk into a Roses or a Maxway and see a Backyard grill  
7 and wonder, well, same or not?

8 Walmart is going to tell you that The Backyard  
9 trademark has no value; that it's really not any good. This  
10 is what I call sour grapes. No again. Think about and  
11 listen to the evidence of the very expensive effort that  
12 Walmart went to in picking and choosing among the various  
13 several trademarks that they could have chosen and then they  
14 finally ended up choosing Backyard. A Walmart witness will  
15 testify that the Backyard trademark fitted well with its  
16 customers; that Walmart filed -- they even filed their own  
17 trademark application to register Backyard as a trademark and  
18 just for the same services and products just like Roses did.  
19 So on the one hand Walmart is saying not even a trademark, no  
20 good, but yet they turn around and file a trademark  
21 application in the trademark office and tell the trademark  
22 office this is our trademark.

23 The value of The Backyard trademark is also  
24 demonstrated by an offer by a third party to license or  
25 purchase The Backyard trademark from Variety and there have

1    been two other infringers, both of whom when they were  
2    contacted by Roses or Variety voluntarily stopped. So we  
3    didn't have to go through this exercise. All of these facts  
4    establish the value of the trademark Backyard.

5            Then Walmart's next excuse is, well, Walmart's  
6    trademark is not really Backyard; it's really the word grill.  
7    Now, we know that's silly. Grill simply defines the product,  
8    right? That's what it is. It doesn't serve to -- it can't  
9    serve as a trademark because it's simply descriptive. Anyone  
10   who wants to sell grills can call it a grill, right, because  
11   that's a descriptive term, just like anybody who wants to  
12   sell toothpaste can call it toothpaste. You might put a name  
13   like Crest or Colgate or Arm & Hammer or something in front  
14   of it. That's the trademark. But toothpaste is the  
15   descriptive term and grill is the descriptive term, and here  
16   Backyard is the trademark and BBQ on Roses' is the  
17   descriptive term. And on Walmart's, Backyard is the  
18   trademark and the word "grill" tells you what it is. It's a  
19   grill.

20           And then Walmart is going to finally -- they're  
21   going to tell you that no one has been confused by Walmart's  
22   infringing use of Backyard. This won't trouble you I don't  
23   think at all. The right question is, and you'll hear his  
24   Honor tell you this, the question is whether there is a  
25   likelihood of confusion. We don't have to prove there has

1    been any actual confusion, but we're going to. The goods are  
2    the same, they're grills, and other accessories. They're all  
3    identical. Walmart's own paid experts conducted surveys, and  
4    despite a very one-sided effort to make those surveys show  
5    what Walmart wanted these surveys to show, in fact these  
6    surveys show a very substantial amount of actual confusion.

7               Now, there are other excuses that you will hear  
8    from Walmart, but the story of this case keeps coming back to  
9    Walmart's willful infringement. Willful. Walmart's  
10   infringement was not an accident. It happened deliberately.  
11   Walmart chose to steal Roses' Backyard trademark with full  
12   knowledge of all the important facts and because they figured  
13   more likely than not they would simply get away with it. It  
14   took The Backyard trademark and it used The Backyard  
15   trademark and it tried to register Backyard trademark as its  
16   own trademark with full knowledge of Variety's prior rights,  
17   and you will be asked to determine whether Walmart's  
18   infringement was willful, deliberate, reckless, without  
19   regard to Variety's trademark rights. No doubt that is true.

20              As I said a few moments ago, this trial is  
21   Walmart's story. Walmart stole Variety's Backyard trademark  
22   knowing that it was Backyard Variety's (sic) trademark, and  
23   when Walmart objected, Walmart said in so many words, shove  
24   it. Walmart kept infringing, even vastly increased its  
25   infringement after Backyard objected -- I'm sorry, after

1     Roses objected.

2                 So you may very well decide that this is a case in  
3     which a larger company with deeper pockets for litigation  
4     selected a product name with the same dominant word as a  
5     smaller company by which to sell the same and similar items  
6     as that smaller company. The larger company knew of the  
7     smaller company's use and trademark when it decided to use  
8     the name, but the larger company used it anyway. The items  
9     were then sold in the same types of stores located in the  
10    same geographic areas and frequented by the same types of  
11    customers. It is difficult to imagine how these  
12    circumstances lead to anything but a likelihood of confusion.

13                Now, I'm going to sit down and let Walmart's  
14    attorney speak. He has a tough job. He's going to have to  
15    convince you that black is white, that wrong is right, that  
16    Walmart should walk away from this courtroom with your  
17    blessing. Walmart will try to explain away its willful  
18    infringement with the excuses that I've listed above and  
19    others. The facts in this case speak for themselves and they  
20    all speak in the plaintiff's favor. As I said, this is an  
21    easy case. Walmart stole Roses' Backyard trademark. Walmart  
22    used that stolen property to sell a billion dollars of  
23    infringing grills and many other related products with full  
24    knowledge of Roses' rights. Walmart did it deliberately,  
25    knowingly and willingly. That will be the end of Walmart's

1 story and the end of Walmart's case. Thank you.

2 THE COURT: Thank you. The jury can be with the  
3 defendant for opening.

4 **OPENING STATEMENT**

5 (by Mr. Puzella)

6 Good afternoon. My name's Mark Puzella and I  
7 represent Walmart. With me at counsel table is Sheryl Garko  
8 and David Hosp, two of my partners. And in addition, we have  
9 Dave Ortiz, who's a 30-year employee of Walmart. He's in  
10 charge of the outdoor products that are in issue in this case  
11 which includes the grills and grilling accessories. You'll  
12 hear from him later.

13 You all have a very important job to do. It's  
14 important because our system relies on citizens like you to  
15 decide disputes. You have to use your common sense and apply  
16 that common sense to what you hear in this courtroom. At the  
17 end of the trial, the Judge is going to instruct you on what  
18 the law is. What you're going to do is process the witnesses  
19 that you heard testify and the documents that were received  
20 and you're going to decide what the facts are. The facts are  
21 not what I say they are right now and they're not what Mr.  
22 Adams just said a moment ago. The facts are what you decide  
23 them a couple of days from now. You're going to decide those  
24 facts and you're going to apply them to the law and you're  
25 going to use your common sense. That's how we resolve



1 disputes, and Walmart is confident that when you apply your  
2 common sense to the facts that you hear, you will rule in our  
3 favor.

4           Ultimately you're going to have to decide two  
5 things. First, are there marks that are valid. So here on  
6 the screen -- hopefully behind me -- you can see the marks  
7 that Variety claims and they were discussed broadly by Mr.  
8 Adams a moment ago. On the left you see that one mark is  
9 registered. That means that it's on a public list,  
10 registered with the federal government, anyone can go look it  
11 up. And importantly, when you go look it up, you can see  
12 what the person who registered it claims the mark applies to.  
13 And you can see down here in yellow that Variety's The  
14 Backyard mark is registered for, quote, retail store services  
15 in the field of lawn and garden equipment and supplies,  
16 closed quote. What's missing there? The word grill and the  
17 word grill accessories. That's what's on the public record.

18           Now, on the right there are unregistered marks, or  
19 depending on the day, Variety just decides that they're a  
20 version of the registered mark. But the point is that there  
21 are other uses. You saw on the Backyard BBQ a few moments  
22 ago on the board there and standing alone Backyard, a claim  
23 that they use those for grills and grilling accessories. But  
24 those aren't registered. What's registered is retail store  
25 services in the field of lawn and garden supplies and

1 equipment. That's what the public record says.

2           Importantly, you will hear that for the  
3 unregistered uses or those uses on grills and grilling  
4 accessories, Variety did very little to make people aware of  
5 the fact that they actually used the words that way. They  
6 only used it on the products and in their circulars. The  
7 little flyers that they hand out or that are in the  
8 newspaper. They didn't use it in magazines, on the Internet,  
9 TV ads, and they certainly didn't register it as we just  
10 discussed.

11           And you're going to hear that a Variety witness, at  
12 the beginning of this case, didn't even know that The  
13 Backyard was used on grills. So what do we have? We have a  
14 use that's not registered, it's not on a public list, it's  
15 not advertised a lot, it's not widely known, and their own  
16 witnesses are uncertain about how they use it, yet you just  
17 heard Walmart was supposed to know all about those uses.  
18 You're going to apply your common sense and see if that's the  
19 case.

20           Now, once you decide what marks or mark are at  
21 issue, you need to decide the question of liability, and in a  
22 trademark case, that's whether there's a likelihood of  
23 confusion, whether people like you in the marketplace are  
24 going to see the two trademarks and be confused by them.  
25 That's it. That's not complicated. You guys can do that.

1           Importantly, you're going to hear what happened in  
2 the real world. You're going to hear that Walmart, as Mr.  
3 Adams just said, sold lots of products. What does that mean?  
4 There were lots of opportunities for shoppers to express  
5 confusion. To say something. To return a product to the  
6 wrong store. To call the wrong store and, I'm trying to  
7 assemble my grill and it's not going together right, what do  
8 I do. To complain because they're unhappy with the product.

9           You will hear that despite all of the products that  
10 were sold, not one, not one shopper said anything. There  
11 isn't a single instance of actual confusion in the real  
12 world. So if you're trying to decide the legal question of  
13 whether there is a likelihood of confusion, isn't the answer  
14 found in whether there's any actual confusion? That's what  
15 you're going to have to decide and that's the sort of common  
16 sense question you're going to have to apply.

17           You're also going to hear testimony from a  
18 Walmart -- that Walmart did not intend to infringe Variety's  
19 trademark. You're going to hear from Ms. Karen Dineen, a  
20 30-year employee at Walmart who's the senior most marketing  
21 person in charge of this branding project. She will tell you  
22 that Walmart was aware of the mark on the left, the  
23 registered mark. Walmart was aware that Variety claimed to  
24 own Backyard for retail store services in the field of lawn  
25 and garden equipment and supplies. She will also tell you

1 that Walmart was not aware that Variety used it on grills.  
2 Walmart didn't know that at the time it adopted its mark and  
3 put it on its products. That is a very important distinction  
4 that, again, you need to filter into your common sense about  
5 whether there's an intent as Variety contends.

6 Another thing that you should consider in this mix  
7 is that the word backyard is not like Tony the Tiger, it's  
8 not like Crest, it's not like Nike, it's not like any of the  
9 examples that we just heard. The word backyard you will hear  
10 is widely used in the marketplace. In fact, Variety's own  
11 witness will tell you that backyard is widely used.

12 Behind me are all of the different federal  
13 trademark registrations that use the word Backyard. There  
14 are lots of them. And there are more than there are on this  
15 slide. Yet, Variety would like you to think that Backyard is  
16 Tony the Tiger or Crest or Nike. How many Tony the Tigers,  
17 Crests or Nikes are there? There's just one. There are lots  
18 of Backyards. So if you're trying to think through whether  
19 consumers are going to be confused by Walmart's use of  
20 Backyard Grill, you should think about how Backyard is  
21 actually used in the marketplace and the fact that lots of  
22 folks use it. Does that contribute to confusion? No. No  
23 one single company can own Backyard for these types of  
24 products.

25 Another thing that you will see over the course of

1 the next day or so are the actual products. You'll see that  
2 both parties use the word Backyard. That's what Variety's  
3 going to emphasize, but they're going to stop there. You  
4 shouldn't stop there. When you're considering how consumers  
5 look at marks in the marketplace, you need to look at the  
6 whole use, the whole mark. How is it used on the actual  
7 products and its packaging. What does it look like to the  
8 shopper on the shelf. It's not just do both companies use  
9 the same word, it's how does the whole thing look.

10 Now, Marvin Deshommes, another 30-year employee of  
11 Walmart, will tell you, along with Ms. Dineen, that Walmart  
12 never thought the word Backyard and the mark Backyard Grill  
13 was going to cause people to buy the products. Walmart did  
14 research with consumers before it chose the name in 2011.  
15 Before it knew about Variety's use on grills. You can see  
16 some that have research here. And here it's important for  
17 you to apply some discipline to the evidence that you hear.  
18 Mr. Adams said a moment ago that Walmart's excuses are made  
19 up after the fact. This document predates the company's  
20 knowledge of Variety's use of grill. This is internal  
21 Walmart research.

22 And you'll see in March 2011, Marvin Deshommes will  
23 tell you this, that, quote, grill names do not have a large  
24 impact on shoppers' decisions when cost features and benefits  
25 are the same. When shopping based on name alone, shoppers

1 will migrate towards well-known recognized names. Things  
2 like Weber. If Backyard Grill was the only available brand,  
3 shoppers are more likely to continue shopping than to make a  
4 purchase decision on the spot.

5 So Mr. Deshommes and Ms. Dineen knew that the word  
6 backyard wasn't going to be the thing that drove people to  
7 buy this product. They knew the thing that was going to  
8 drive people to buy the product was quality, price and  
9 features. So what did they do? They designed the packaging  
10 to accentuate that.

11 Here's a page from Walmart's brand manual. And you  
12 can see an example of the packaging and you can see that the  
13 packaging is not designed for the word backyard to be front  
14 and center. For the consumer to shop based on the presence  
15 of the word backyard. Why? Because lots of people use  
16 backyard. It's descriptive of the product. It's a backyard  
17 grill.

18 You can see here on the screen Backyard is small.  
19 Grill is large. The letter I is replaced by a picture of a  
20 grill. Unique logo that Variety doesn't use, and Variety  
21 doesn't use grill either. It's white on black. The name of  
22 the product and its features are bold and big in red. So  
23 when you have to think about whether there's a likelihood of  
24 confusion and thinking about what the shopper sees on the  
25 shelf in the store, they're seeing this. They're not seeing

1 Backyard and Backyard. They're seeing the whole thing. And  
2 that's what you should consider when assessing the likelihood  
3 of confusion.

4 Now, another thing you're going to see over the  
5 course of the next couple of days are the parties' products.  
6 Here on the screen you'll see some of the products, and  
7 you'll see that the overall presentation of the parties'  
8 products is different. Walmart didn't steal Variety's mark.  
9 They look different. This isn't a case of knock-offs, this  
10 isn't a case of counterfeiting, this is a case of two  
11 companies using a very common word, backyard. You saw a few  
12 moments ago 30, 40 companies use it in the state. This isn't  
13 theft; this is a regular word applied to products as you  
14 would expect to see in the marketplace. And when you look at  
15 the products side by side, your common sense should tell you  
16 that Walmart just designed its products to feature the  
17 products, the name of what the thing is, whether it's gas  
18 grill, 17-piece premium barbecue set, or 60-inch grill cover.  
19 That's what's front and center.

20 You'll also hear from two different survey experts  
21 that opposing counsel mentioned, Hal Poret and George Mantis.  
22 Those survey experts tested whether there's a likelihood of  
23 confusion. They designed surveys to test that very question.  
24 They polled real consumers. People like you. Hundreds of  
25 them. One of them tested whether consumers were likely to

1 confuse Walmart's mark with Variety's mark and the other did  
2 the reverse, whether consumers are going to confuse Variety's  
3 mark with Walmart's mark.

4           You will hear from both experts, and they'll tell  
5 you that the results of their survey show that there's no  
6 likelihood of confusion. There's none. So what do we have?  
7 We have no real-world instances of actual confusion despite  
8 lots of sales. Not one person, not one shopper. We have the  
9 mere use of a word that lots of people use on these types of  
10 products and the overall design is different. And we have  
11 two survey experts who tested this issue and found no  
12 likelihood of confusion. You won't hear about surveys from  
13 Variety. They didn't do one. At least they didn't --  
14 they're not going to present one. So you're only going to  
15 hear surveys from Walmart.

16           So at the end of the trial, we're going to ask you  
17 to apply your common sense. You're all shoppers, you're all  
18 experienced people in the world. Take in the evidence, weigh  
19 the facts, apply the law, and when you do that, Walmart's  
20 confident that you will rule in our favor. Thank you in  
21 advance for your attention. I look forward to talking to you  
22 over the next couple of days.

23           THE COURT: All right. The company with the stand,  
24 are you ready with your first witness?

25           MR. ADAMS: Your Honor, the plaintiff calls Mr.



1 Blackburn.

2 **GEORGE TEMPLETON BLACKBURN II**

3 having been duly sworn, testified as follows:

4 THE WITNESS: I do.

5 **DIRECT EXAMINATION**

6 BY MR. ADAMS:

7 Q. Good afternoon, Mr. Blackburn. Would you state  
8 your name for the record, please.

9 A. I'm George Templeton Blackburn II.

10 Q. And Mr. Blackburn, where were you born and raised?

11 A. Henderson, North Carolina.

12 Q. And where do you live now?

13 A. Henderson, North Carolina.

14 Q. And what is your occupation?

15 A. I'm an attorney licensed to practice law in North  
16 Carolina, and I am currently senior vice-president and  
17 general counsel of Variety Wholesalers.

18 Q. Mr. Blackburn, would you please tell the jury just  
19 a little bit about your educational background?

20 A. I attended the public schools in Henderson,  
21 graduated from Henderson High School. Then I went to the  
22 University of North Carolina at Chapel Hill undergraduate,  
23 and then I attended the law school at the University of North  
24 Carolina in Chapel Hill and graduated in 1976.

25 Q. Now, Mr. Blackburn, also give us just a short

1 summary of your employment history.

2 A. When I graduated and passed the bar in 1976, I went  
3 back to Henderson and joined the law firm of Perry, Kittrell,  
4 Blackburn & Blackburn. The two Blackburns were my father and  
5 my uncle, and Mr. Perry and Mr. Kittrell, they were first  
6 cousins with each other. And I worked with them and  
7 practiced -- I became lead counsel for Roses, outside counsel  
8 for Roses in 1984, still a member of the law firm.

9 Then in 1991 Roses asked me to come in-house as  
10 their first in-house counsel, and so I was employed by Roses  
11 Stores from 1991 until 1997, when Variety Wholesalers bought  
12 Roses Stores. So then I was employed by Variety Wholesalers  
13 first as its vice-president and general counsel and then as  
14 senior vice-president and general counsel.

15 Q. So you worked in a law firm, you said you worked  
16 in-house with Roses and Variety. Can you explain the  
17 difference between an in-house attorney and an attorney who  
18 works in a law firm?

19 A. Yes, and people do get confused about that. A  
20 lawyer practicing in a private law firm can represent any of  
21 a wide variety of clients, but when you're in-house counsel  
22 you only work for that one company. So I was exclusively  
23 working for those companies when I was employed by Roses  
24 Stores and Variety Wholesalers.

25 Q. So Mr. Blackburn, when you succeeded Mr. Kittrell

1 as lead attorney for Roses in 1984, what types of legal work  
2 were you responsible for on behalf of Roses?

3 A. At that time Roses had no in-house general counsel,  
4 so I handled essentially the whole gamut of their legal  
5 requirements that they had and they were broad. It was  
6 employment law, profit-sharing trust for the employees,  
7 contract issues, trademarks, real estate, leases for their  
8 stores, and Securities and Exchange Commission filings  
9 because it was publicly held.

10 Q. Now, you mentioned trademarks. What was your  
11 responsibility there?

12 A. I first encountered trademarks for Roses early on  
13 in the late 1970s and so I was responsible for advising them  
14 about their trademarks, and I early on associated Mr. Adams'  
15 firm and Mr. Adams' firm has handled the detailed work for  
16 the trademarks for Roses Stores and then Variety Stores ever  
17 since the late 1970s.

18 Q. And how, if at all, did your duties change once you  
19 began working in-house at Roses?

20 A. They were the same basic duties as outside, but I  
21 had been particularly brought in-house because Roses had the  
22 need to work on financing agreements with its banks and I was  
23 brought in-house to be involved particularly in the  
24 negotiations that were taking place for financing Roses'  
25 inventory.

1           Q.     Now, Mr. Blackburn, tell the jury something about  
2 the history of Roses Stores just briefly.

3           A.     Roses was founded by Mr. Paul H. Rose, Paul Howard  
4 Rose. He was from Seaboard, North Carolina, which is a real  
5 small town about halfway between Elizabeth City and  
6 Henderson, where I live. He moved to Henderson in 1915,  
7 opened the store. It went bust. He bought out his two  
8 partners and reopened the store as a Roses store. And back  
9 then, you had -- the variety stores were very small and they  
10 were what you would call a five-and-dime store. His was a  
11 5-cent, 10-cent, 25-cent store.

12                 And he opened the first store there, then he opened  
13 a second store in Oxford, North Carolina, ten miles away. He  
14 put his brother, TB Rose, in charge of that, and then he  
15 opened two more stores in North Carolina and two in South  
16 Carolina. One in Franklin, Virginia, which is not very far  
17 from where we are right here.

18                 And then they just started expanding from then on.  
19 They were very like the Woolworth's stores which had really  
20 invented the form of retail where you go in and actually get  
21 to look at the products. Before then everyone would go in a  
22 store and the products were on shelves going all the way up  
23 to the ceiling in plain boxes and the clerk would wait on  
24 you. But these were variety stores that you could go in and  
25 products were on the table and you could look at them and buy

1    them, and they were all right in the central business  
2    district of town. There were about 5,000 square feet and  
3    they sold a variety of things from candy, fresh popped corn,  
4    notions, things to sew with, toys -- we were famous for  
5    toys -- and clothing. All sorts of things were sold in those  
6    stores.

7               And that continued really that way, those were the  
8    way the stores were, until the 1960s. In the 1960s stores  
9    started moving out of the central business district and going  
10   to strip malls just outside of town because people were  
11   moving out to those areas, and so Roses also started  
12   developing stores in the strip malls.

13              Well, these were much larger stores. These would  
14   range anywhere from 25,000 to 70,000 was about the largest  
15   store that we had. And so they sold the same breadth of  
16   things, but they had many more types that you could buy --  
17   different types of toothpaste and more types of cloth and  
18   notions and things like that.

19              And so at that time our chief competitor was no  
20   longer Woolworth's, it was K-Mart. We would go to a town, we  
21   were typically the store that would be what's called an  
22   anchor tenant when the shopping mall got opened or the  
23   shopping center. We would be one of the anchor tenants and  
24   the other -- a food store would join us and the other small  
25   retailers.

1           And then K-Mart, after we'd been there for awhile,  
2 K-Mart started moving in the area and they would build a  
3 store right opposite us or very near, because these were all  
4 towns about the size of Henderson and Elizabeth City.  
5 They're about the same sized towns. And they would compete.  
6 We'd have competition. For about two years our profits would  
7 be down and at the end of two years it would be back up and  
8 they would get better, and so that continued. That was the  
9 way retail was in our geographic area, which was really ten  
10 states and the southeast.

11           That was the way we operated and competed until the  
12 1980s. We reached our peak profitability in the 1980s and  
13 then in the late '80s, Walmart changed the landscape in  
14 retail.

15           Q.     Let me ask you, Mr. Blackburn, what was Roses  
16 Stores' financial position in the 1990s?

17           A.     In the 1990s it became very difficult. In fact,  
18 that was why I was brought in-house as general counsel, to  
19 help work on the financing of the inventory. First the banks  
20 themselves got in trouble and that caused them to tighten up  
21 on credit, but the banks became worried about the future of  
22 retailers because there had been a number of retail companies  
23 that had gone under due to the competition with Walmart at  
24 the various places and they wanted to know what was -- how  
25 was Roses going to meet that competition, what were they

1 going to do to be able to survive against Walmart.

2 And it really was a different story because unlike  
3 when K-Mart moved next to us, their store might be 5,000  
4 square feet more than ours but not significantly different.  
5 But Walmart would come in and build a store that was 80,000  
6 or 90,000 square feet, and here we were in a shopping center  
7 with one store on one side and one store on the other and not  
8 much you can do. And of course the banks wanted to know how  
9 are you going to be able to compete with them, how are you  
10 going to be able to continue.

11 And so we had difficulty getting financing to  
12 continue operations. We had to seek Chapter 11 protection  
13 from -- in a bankruptcy and reorganize the company. We had  
14 to get rid of a number of our stores. We lost a lot of good  
15 employees. But we came out of Chapter 11, reorganized in  
16 1995, and in 1997 we were purchased by Variety Wholesalers,  
17 which was a private company.

18 Q. All right. Mr. Blackburn, at that time what was  
19 Roses' relative size? How many stores did it have in how  
20 many states?

21 A. When we came out of Chapter 11 we had 106 stores  
22 and they were in ten states.

23 Q. So what was your role with Variety Wholesalers  
24 after the purchase of Roses?

25 A. I handled the same type of matters for them that I

1 handled for Roses except with two major exceptions. I didn't  
2 have to be involved much in banking or finance. Variety  
3 Wholesalers had operated very conservatively and had a very  
4 strong financial statement and large cash reserves and was  
5 able to provide stable financing to run the Roses Stores and  
6 the stores they already had, so I didn't have to be involved  
7 in that. And I didn't have to do any Securities and Exchange  
8 Commission filings, which was great relief to me --

9 Q. Now, Mr. --

10 A. -- because they're not publicly held.

11 Q. Excuse me. Now, Mr. Blackburn, I think his Honor  
12 may have mentioned there were several stores, the names of  
13 stores owned by the Variety Wholesalers. Would you just  
14 remind and tell the jury what they are?

15 A. Well, Judge Boyle was correct. Eagles was one of  
16 those stores. Variety had expanded by buying small troubled  
17 companies and acquiring their stores over a long period of  
18 time. They had started back in the 1940s. And so they  
19 collected a large number -- a large variety of names like  
20 Pope's, which was the first stores, then Eagles, some Ben  
21 Franklin stores they had. They bought the Maxway Company  
22 that was based in Sanford, North Carolina. They bought  
23 Valumart.

24 Since I've been there they bought Bill's Dollar  
25 Stores. So they had a large number of names, but today the



1 names that are used are really Roses Stores and Roses Express  
2 and Maxway, and then we've got some of those others still  
3 left over that are in small stores in various places.

4 Q. Mr. Blackburn, what kind of goods does Variety  
5 Stores sell now?

6 A. The same variety of goods that we've always sold  
7 and it's anything from clothing to candy, health and beauty  
8 aids. Several of you said that you have shopped in our  
9 stores, so you know we sell the same types of things that  
10 Walmart sells. We don't have the same depth of merchandise  
11 that they have. We may not have the same variety of any  
12 given item, but we sell the same breadth of items they sell.

13 Q. Mr. Blackburn, how many stores does Variety  
14 Wholesalers have now?

15 A. About 370 stores now.

16 Q. And over what physical footprint?

17 A. Well, there are 16 states plus the District of  
18 Columbia. And basically you go from Florida north to  
19 Pennsylvania, across to Indiana, down to Louisiana, back to  
20 Florida.

21 Q. Mr. Blackburn, are all the Variety's customers in  
22 those 17 jurisdictions?

23 A. No. We have stores in places like Virginia Beach;  
24 Norfolk, where you have military people coming in and out  
25 from all over the country. Vacation places, Virginia Beach

1 or Myrtle Beach or Orlando, Florida, where people can come  
2 from all over the country. And of course you have people who  
3 have family members visiting, coming back from where --  
4 coming to visit people where our stores are located, and so  
5 our customers can be on any given day in a store from all  
6 over the United States literally.

7 Q. So does Variety Wholesalers have any plans for  
8 expansion?

9 A. We do. Up until now, all the stores for the  
10 company have been supplied from one distribution center in  
11 Henderson, but about a year ago, we opened a second  
12 distribution center just west of Atlanta in Newman, Georgia,  
13 which will enable us to expand towards the west and states  
14 north and west of there.

15 Q. Now, Mr. Blackburn, you mentioned a few moments ago  
16 that your duties at Roses and now at Variety's include  
17 trademark matters; is that correct?

18 A. That's correct.

19 Q. How many trademarks did Roses have before being  
20 purchased by Variety?

21 A. 21.

22 Q. And what do you understand the role of Variety's  
23 trademarks to be?

24 A. Well, really what they do is they identify our  
25 stores and our products to our company and the purpose of

1     them is to provide names, both on the stores and our  
2     products, that we can be known by and our customers won't be  
3     confused as to where the product came from or who we are. So  
4     the trademarks are very important to that.

5           Q.     Well, how are they important to the company's  
6     business?

7           A.     Well, the of course, the signs on the stores, the  
8     names of the stores are important so our customers can find  
9     us in the -- on the Internet or find where our stores are  
10    because they know the name, but also the product lines, our  
11    private label products, those have been developed with the  
12    idea that customers will grow to like them and know that you  
13    can only get those at a Roses store or a Maxway store and  
14    when they want to buy those products will come shop with us  
15    and hopefully not just buy those things but buy a whole lot  
16    more.

17          Q.     So does Variety own any trademarks for house brands  
18    for lines of merchandise that are manufactured for Variety  
19    and only for Variety?

20          A.     Yes.

21          Q.     Can you provide a few examples?

22          A.     Well, in the soft lines we have a name called  
23    Carolina Bay, and of course this lawsuit is about the mark we  
24    developed for our lawn and garden and grilling products which  
25    is Backyard. The Backyard.

1           Q.     Now, Mr. Blackburn, what does Variety do to protect  
2 its trademarks?

3           A.     We register them originally, we keep them  
4 registered when the renewal dates come up, and we take action  
5 when they're being infringed.

6           Q.     So, Mr. Blackburn, why did Roses make the decision  
7 to adopt The Backyard trademark?

8           A.     It was part of our strategy -- this happened in  
9 1993, which was right when we were in the thick of our trying  
10 to figure out and trying to establish in our customers' minds  
11 our own niche in comparison really with Walmart. We wanted  
12 to develop a line of products that were inexpensive, and that  
13 meant private labels. You weren't having to pay someone for  
14 the name brand that you were getting, but you developed good  
15 quality products and you'd have a name on them for your line  
16 of those products.

17                     And so that was the idea in the lawn and garden  
18 department. They decided they were going to develop private  
19 label goods in lawn and garden -- the whole gamut of them  
20 from hoses and sprinklers and patio umbrellas and grills and  
21 grilling accessories and all of those things.

22           Q.     So what did Roses do after it made the decision to  
23 adopt and use the Backyard trademark?

24           A.     I met with the merchants and understood what they  
25 were doing and I got in touch with your firm about preparing

1 the registration application.

2 Q. When was that, in 1993 I think you said?

3 A. Yes, it was in 1993.

4 Q. Did Roses file a federal trademark application in  
5 the United States Patent and Trademark Office?

6 A. We did.

7 Q. Why did Roses file a federal trademark application  
8 if it only had stores in ten states?

9 A. Well, we wanted the protection of the federal laws  
10 for our mark. We wanted the mark to have protection in all  
11 50 states because we were hoping and expecting to expand into  
12 other areas so that would best be served by having a federal  
13 mark. And it's also easier for your competitors to find a  
14 mark that's registered on the -- in the federal trademark  
15 office so it's known and they won't use it.

16 Q. So, Mr. Blackburn, are federal trademark  
17 applications and related documents available for viewing by  
18 the public?

19 A. They are. There is a website that's maintained by  
20 the trademark office and I am computer illiterate, but I can  
21 go on there and find -- look up trademarks that use Backyard  
22 or use some particular word in just a matter of minutes. You  
23 can easily get on their site and use -- you don't have to  
24 have a password, you just go onto their site and you can look  
25 them up.

1           Q.     So, Mr. Blackburn, what was your involvement in the  
2 trademark application process for The Backyard trademark?

3           A.     Well, I didn't draft the application, obviously  
4 that was drafted by your firm, but I reviewed what needed to  
5 be reviewed and we signed the necessary documents for you to  
6 file.

7           Q.     All right. Mr. Blackburn, at this point I would  
8 like to have you refer to some exhibits. Do you have your  
9 exhibit book --

10          A.     Not yet.

11               MS. TRIMMER: May I, your Honor?

12               (Ms. Trimmer providing documents to the witness)

13          Q.     Now, Mr. Blackburn, would you turn to Plaintiff's  
14 Exhibit P-52(C) at page 9. Do you recognize this document?

15          A.     This is the application for registration of the  
16 federal trademark for The Backyard.

17          Q.     All right. What is written on page one of this  
18 application?

19          A.     "Mark, The Backyard, class number 42 (prior U.S.  
20 class 100) to the Assistant Secretary and Commissioner of  
21 Patents and Trademarks. Roses Stores, Inc., P.O. Drawer 947,  
22 Henderson, NC 27536. State of incorporation, North Carolina.  
23 Applicant requests registration of the above identified mark  
24 shown in the accompanying drawing in the United States Patent  
25 and Trademark Office on the principal register established by

1 the act of July 5, 1946, for retail store services in the  
2 field of lawn and garden equipment and supplies in class 42.  
3 Applicant has a bonafide intention to use the mark in  
4 commerce on or in connection with the above identified  
5 services. The mark will be used on advertising and promotion  
6 for the services, on signage, and in other ways customary to  
7 the trade."

8 Q. Mr. Blackburn, why is The Backyard trademark in  
9 plain block form?

10 A. Well, we had discussed that internally. We wanted  
11 the widest possible registration of the mark. We didn't want  
12 it tied to one kind of script or one way of showing it. We  
13 wanted it just words, The Backyard. That was what we were  
14 getting the registration for, and so it was done in block  
15 characters.

16 Q. All right. So the application states, The mark  
17 will be used on advertising and promotion for the services,  
18 on signage, and in other ways customary to the trade." Is  
19 that in fact how Variety has used the trademark over the past  
20 25 years?

21 A. Yes. We've used it in advertising like tabloid  
22 inserts and promotions for the services and ads and on  
23 signage, both in the stores and on shelving and on the  
24 products themselves that have the marks on them. Those are  
25 the ways that are customary to the trade.

1           Q.     All right.  So what happened next after the  
2 application was filed?

3           A.     After the application was filed, the trademark  
4 office did a search of their records to see if somebody had  
5 already registered it.  And after they had done a check to  
6 see if that had been done and determined that it hadn't been  
7 registered by anybody else, they notified us that it was  
8 eligible to be registered and that the next step would be to  
9 publish it.

10          Q.     All right.  Now, Mr. Blackburn, turn to Plaintiff's  
11 Exhibit P-58 at 9.  Can you identify this for the jury?

12          A.     This one at page 9.

13          Q.     The notice of publication.

14          A.     The notice of publication.

15          Q.     Just use the copy on the board -- on the screen,  
16 Mr. Blackburn.

17          A.     Wait a minute, I do think I have it here.  
18 (Perusing exhibits).  I found it.  Okay.  This was dated May  
19 21, 1993, and it's the Notice of Publication from the  
20 trademark office.  And it states that:  The mark of the  
21 application identified, which is The Backyard, appears to be  
22 entitled to registration.  The mark will, in accordance with  
23 Section 12(a) of the Trademark Act of 1946, as amended, be  
24 published in the Official Gazette on the date indicated above  
25 for the purpose of opposition by any person who believes he



1 will be damaged by registration of the mark.

2 Q. All right. Let me stop you there. Did anyone  
3 oppose registration of this trademark by Roses?

4 A. No. No one did.

5 Q. So as you turn to Plaintiff's Exhibit P-58(C) at 8.  
6 Can you identify this, Mr. Blackburn?

7 A. This is the Notice of Allowance that the Trademark  
8 Office sent to us. And this states that: The mark  
9 identified below, which is marked The Backyard, was published  
10 for opposition under 15 U.S. Code, Section 1062(a). No  
11 successful opposition was filed. In order to obtain  
12 registration, applicant must file a Statement of Use under 15  
13 U.S. Code within six months of the mailing date of the  
14 notice.

15 Q. Now, what is the Statement of Use, Mr. Blackburn?

16 A. The Statement of Use is that you actually are using  
17 the mark in commerce. So you can register a mark without  
18 having used it yet and many times that's what takes place,  
19 but you have to actually use the mark in commerce to be able  
20 to perfect the registration.

21 Q. Now, Mr. Blackburn, when you filed the Statement of  
22 Use did you also file what are called specimens showing the  
23 mark in commerce?

24 A. Yes. The Statement of Use was filed actually in  
25 1994 and you don't just say you're using it, you have to

1 prove to the office that you're using it. So you have to  
2 file what are called specimens with them, which are actual  
3 examples of how you've used that mark, which for us was The  
4 Backyard, how you have used it in commerce.

5 Q. And in 1994 what kinds of goods was The Backyard  
6 trademark being used on?

7 A. It was being used on a wide variety of goods that  
8 are sold in our lawn and garden department.

9 Q. Was it being used on barbecue grills and grill  
10 accessories?

11 A. It was.

12 Q. So that was in 1994, correct?

13 A. Correct.

14 Q. So what happened after the Statement of Use was  
15 filed?

16 A. After the Statement of Use was filed, a  
17 registration was in fact -- they were accepted and a  
18 registration was in fact issued by the Trademark Office.

19 Q. All right. Will you turn to Plaintiff's Exhibit  
20 P-1.

21 MR. ADAMS: Your Honor, plaintiff moves Exhibit 58  
22 into evidence.

23 THE COURT: Received.

24 **(Plaintiff's Exhibit No. 58 received into evidence)**

25 Q. (By Mr. Adams) Now turn to Plaintiff's Exhibit

1 P-1. Would you just describe briefly what this is?

2 A. Well, this is a certified copy of the actual  
3 registration. This certificate was -- cover certificate was  
4 issued in 2015, but attached to it is the actual registration  
5 for The Backyard which assigned it a registration number and  
6 that was in 1994.

7 MR. ADAMS: Your Honor, plaintiff moves P-1 into  
8 evidence.

9 THE COURT: Received.

10 **(Plaintiff's Exhibit No. P-1 received into evidence)**

11 Q. (By Mr. Adams) Now, Mr. Blackburn, turn to  
12 Plaintiff's Exhibit P-58(E) at 174. Do you have that?

13 A. Yes.

14 Q. Can you identify what P-58(E) is?

15 A. P-58(E) is the combined declaration under Section 8  
16 and Section 15 that was filed with the Trademark and Patent  
17 Office in the year 2000.

18 Q. And what was the purpose of this declaration under  
19 Section 815, Mr. Blackburn?

20 A. After you've been given a registration, you have to  
21 use it and continue to use it and a lot of companies don't do  
22 that, and the Trademark Office has this requirement in place  
23 so that people who don't use them for whatever reason, they  
24 can clear those out so other people can use them. But this  
25 was our declaration that we had continued to use them in

1 commerce, and it was also a declaration under Section 15  
2 because at this point, we were entitled -- if we had been  
3 using it continuously in commerce for that period of time, we  
4 were entitled to have the mark established as incontestable.

5 Q. What is your understanding as to the meaning of  
6 that term "incontestable"?

7 A. It means that with very few exceptions, someone  
8 can't come in and say you weren't entitled to have that mark  
9 registered. It wasn't a valid registration.

10 Q. All right. Now, Mr. Blackburn, explain what  
11 happened in 2004 and 2014.

12 A. Those were the 10 and 20-year anniversaries of the  
13 registration of the mark, and to keep the mark active and  
14 registered you have to file renewals. So in both those  
15 years, in 2004 and 2014, we filed renewal affidavits which  
16 said that we still were using the mark and gave further  
17 specimens.

18 MR. ADAMS: Your Honor, plaintiff moves Exhibit  
19 P-58(E) into evidence.

20 THE COURT: Received.

21 **(Plaintiff Exhibit No. P-58(E) received into evidence)**

22 Q. (By Mr. Adams) Now, Mr. Blackburn, turn to  
23 Plaintiff's Exhibit P-59 at 22. Can you identify this for  
24 the record, Mr. Blackburn?

25 A. This is what is called a tab or insert. It's an

1 advertising circular. And this one was from 2014, and it has  
2 various items in it that are being sold in this  
3 advertisement. And you see on this first page, The  
4 Backyard -- on that first you see it up there in the  
5 left-hand corner. And it's hard to see, but right above  
6 Backyard is The. And it's -- that "The" is there every time  
7 we use Backyard. And it's also hard to see after the D, but  
8 there's an R in the circle.

9 That little logo that's being shown with it, that  
10 was drawn by Sheila Moffett, who was our advertising person  
11 when we first came up with The Backyard. That was really her  
12 idea and she was -- when she did this design, she was showing  
13 the whole range of products that we were going to use the  
14 mark on and that in fact we did use the mark on. It's  
15 everything from garden shears to shovels to patio umbrellas  
16 to grilling accessories. There's a grilling fork with a  
17 hotdog on it and a spatula to show we were using it on a  
18 whole range of products.

19 Q. What else was it being used on at the time, Mr.  
20 Blackburn?

21 A. Well, it was also used on grills. When you get to  
22 the page that's on the screen there, you can see one of the  
23 grills that was a Backyard grill that was being sold.

24 MR. ADAMS: Plaintiff moves into evidence  
25 Plaintiff's Exhibit P-59, page 22.

1 THE COURT: Received.

2 (Plaintiff's Exhibit No. P-59, page 22 received into  
3 evidence)

4 Q. (By Mr. Adams) Now, Mr. Blackburn, turn to  
5 Plaintiff's Exhibit P-59 at 15. Can you identify this, Mr.  
6 Blackburn?

7 A. This was the specimen that was attached to the  
8 renewal application in 2004, and it's for a sprinkler that  
9 you attach to a hose and as you see up in the left-hand  
10 corner is The Backyard and there is the product description  
11 on there. This is the cardboard backing that the sprinkler  
12 was attached to when it was sold in the store.

13 MR. ADAMS: Plaintiff moves Exhibit P-59 into  
14 evidence.

15 THE COURT: Received.

16 (Plaintiff's Exhibit No. P-59, page 15 received into  
17 evidence)

18 Q. (By Mr. Adams) Now, Mr. Blackburn, do you have  
19 P-59 at 10?

20 A. Yes.

21 Q. Is this a specimen that was filed along with a  
22 Section 815 affidavit in the year 2000?

23 A. Yes. This is the backing on a nozzle for a hose.

24 Q. And, Mr. Blackburn, when that specimen was filed in  
25 the year 2000 to demonstrate that The Backyard trademark was

1     being used, was that specimen accepted by the Trademark  
2     Office?

3             A.     Not initially.

4             Q.     Why not?

5             A.     They said, well, this is how you're using it on a  
6     product, but we need to see that you're also doing what you  
7     said, using it for retail store services.

8             Q.     All right. So in essence what this is saying is  
9     that on the public record of the trademark office, The  
10    Backyard mark is shown as being used both on goods and in  
11    services, correct?

12            A.     Correct.

13            Q.     And was this specimen eventually accepted by the  
14    Trademark Office?

15            A.     It was.

16            Q.     Would you turn to Plaintiff's Exhibit P-58 at 154.  
17    I think we may be having an equipment -- is that it? Okay.  
18    Can you identify this, Mr. Blackburn? It's P-58(E) at 154.

19            A.     P-58(E).

20            Q.     (E) and 154.

21            A.     I do not have that in my book.

22            Q.     All right. We'll move forward. You just testified  
23    that the rejection of the specimen was withdrawn and it was  
24    accepted; is that right?

25            A.     That's correct.

1 Q. All right. Can we now move to Plaintiff's  
2 Exhibit 59 at 1. Can you identify this, Mr. Blackburn?

3 A. This is the specimen that was filed with the  
4 original Statement of Use in 1994.

5 Q. All right. What does that show being used in  
6 connection with The Backyard trademark?

7 A. Well, what you're looking at is a little section  
8 from one of the tab circulars that we advertised with and  
9 it's showing The Backyard mark, and The Backyard is there and  
10 underneath it is a lawnmower that you would buy in our lawn  
11 and garden department.

12 Q. All right.

13 MR. ADAMS: Plaintiff moves Exhibit P-59 at 1.

14 THE COURT: Received.

15 **(Plaintiff's Exhibit No. P-59, page 1 received into evidence)**

16 MR. ADAMS: And also P-59, 30, your Honor.

17 THE COURT: Received.

18 **(Plaintiff's Exhibit No. P-59, page 30 received into**  
19 **evidence)**

20 Q. (By Mr. Adams) So how do you know this specimen  
21 was actually filed in the Patent and Trademark Office?

22 A. It's got a stamp on it from the patent office mail  
23 room. It says, "Patent and Trademark Office mail room  
24 March 2, 1994."

25 Q. All right. Mr. Blackburn, you've referred several



1 times to The Backyard trademark. Would you explain what  
2 you're referring to?

3 A. Well, it's the words "The Backyard" which appear in  
4 that banner right there across the circle. And in this  
5 particular tab it's used that way, but it's really that word,  
6 Backyard, which is also used by itself further on in the tab.

7 Q. Can we turn to that?

8 A. There it is.

9 Q. Okay. And Mr. Blackburn, please turn to  
10 Plaintiff's Exhibit P-78. Can you identify Plaintiff's  
11 Exhibit P-78, Mr. Blackburn?

12 A. Yes. This is the summary that was prepared under  
13 my direction and supervision showing the advertising, print  
14 advertising expenses that we had that were attributable to  
15 merchandise and services for Backyard from 1993 to 2012.  
16 That's what's shown at the top. And then below that is the  
17 expense for labeling and packaging that had to do with  
18 Backyard.

19 Q. And just in general, just summarize those totals  
20 for the jury.

21 A. Okay. What -- in the top you see the year in the  
22 first column and then the total tab expense we had for that  
23 year. The number of tabs, the number of tabs that had  
24 Backyard merchandise in it. And Backyard merchandise by its  
25 very nature, that stuff was sold principally from Easter

1 through the end of summer, so only certain months of the year  
2 that you'd be selling Backyard merchandise. And then the  
3 percent that that number of tabs represents to the whole, and  
4 then what the dollar value attributable to that -- those tabs  
5 is shown in the last column.

6 Q. And it's many million of dollars, isn't it, Mr.  
7 Blackburn?

8 A. It's over \$40 million.

9 MR. ADAMS: Plaintiff moves Plaintiff's Exhibit 78.

10 THE COURT: Received.

11 **(Plaintiff's Exhibit No. 78 received into evidence)**

12 Q. (By Mr. Adams) Now, what else is shown in  
13 Plaintiff's Exhibit P-78, Mr. Blackburn?

14 A. That's the expense attributable to the packaging  
15 that would have Backyard on it. For instance, that nozzle  
16 that you saw, what it cost to print The Backyard on that  
17 nozzle holder. So this is -- we only had records for these  
18 years, 2009 through 2013, at this point when this was done.  
19 This was done in 2013. So we applied the cost that that  
20 would represent to the -- the cost of the product, and in  
21 that last column that's what the expense was.

22 Q. Mr. Blackburn, is packaging important to Variety?

23 A. It's very important. It's one of the key ways that  
24 you -- that customers decide what they want to buy, and so  
25 it's very important. The packaging is very important.

1           Q.     Does Variety consider that to be a form of  
2 advertising?

3           A.     Yes.

4           Q.     Mr. Blackburn, so far as you know, do customers  
5 frequently come into a Roses or other Variety store without a  
6 complete list of products they want to purchase?

7           A.     Yes. Or they have some idea of what they want to  
8 purchase but they don't know exactly which one they want to  
9 purchase.

10          Q.     What does the packaging have to do with that?

11          A.     Well, it's very influential to them as to what  
12 they're going to buy, including the name that's on the  
13 product. The names, the tradenames that are associated with  
14 it or really even the sound of the name, what it represents  
15 to them can influence them in how they buy.

16                 An example is you might come into a Roses store and  
17 you're looking for a grill and you pick up a box and it  
18 looks -- it's got the right price, it looks sturdy, it's the  
19 kind you want, and the name may be Fly by Night. And you  
20 might think, well, I'm not sure I want to buy that product  
21 with that name on it, even though it's got the price I want.  
22 But if it's got the name Backyard on it, that sounds like  
23 something I can see in my backyard. I think I'll take it to  
24 the front desk and buy it. So it can play an important role  
25 in the decision that the customer makes.

1 Q. All right. Mr. Blackburn, turning to Plaintiff's  
2 Exhibit P-7. Would you identify this for the record?

3 A. This was an Easter tab that we put out in 2013, I  
4 believe is the date on there. Yes, 2013. And it's showing  
5 Easter clothing there on that first page. It tells people  
6 that they can go to our Facebook or website, Roses' Facebook  
7 or website, and then the merchandise that's in there from --  
8 as you go through it, you get further on and you get to the  
9 section that is Backyard merchandise.

10 Q. All right. Let's take a look at that.

11 A. So here you see you've got that Backyard about  
12 midway down the page and then also in the yellow box, and  
13 it's showing grills that we're selling. And it's also  
14 showing other things that are featured in the lawn and garden  
15 department that you can buy, some of which are actually  
16 Backyard, have Backyard on the merchandise and others are  
17 just part of the department that is where the goods are sold.

18 MR. ADAMS: Plaintiff moves Exhibit P-57 into  
19 evidence, your Honor.

20 THE COURT: Received.

21 **(Plaintiff's Exhibit No. P-57 received into evidence)**

22 Q. (By Mr. Adams) Now, Mr. Blackburn, are you  
23 familiar with Walmart's advertising for its Backyard  
24 products?

25 A. Yes.

1 Q. And how have you become familiar with their  
2 advertising?

3 A. Well, like anybody else, I get circulars that they  
4 may send in the mail or I've shopped in their stores and seen  
5 the labeling on the products and -- but more particularly, of  
6 course, in this proceeding where they have produced for us  
7 information with regard to their advertising.

8 Q. And would you describe your understanding of what  
9 Walmart's advertising is?

10 A. Well, it's the same things -- same ways we  
11 advertise. It's print media, website, advertisement on your  
12 products. The things that are customary in the trade.

13 Q. All right. Mr. Blackburn, I'll refer you to  
14 Exhibit P-63, please. I want you to read into the record the  
15 second paragraph of Walmart's answer to Variety's  
16 interrogatory number 13.

17 A. "Subject to and without waiver of the foregoing  
18 objections, applicant currently advertises, intends to  
19 advertise its Backyard Grill and design products via the  
20 Internet, print media and other typical retail advertising  
21 means."

22 Q. Does that confirm your understanding about the way  
23 Walmart advertises and promotes its Backyard products?

24 A. It does.

25 Q. Mr. Blackburn -- I'm sorry.

1 MR. ADAMS: Plaintiff moves Exhibit P-63.

2 THE COURT: Received.

3 **(Plaintiff's Exhibit No. P-63 received into evidence)**

4 Q. (By Mr. Adams) Mr. Blackburn, has The Backyard  
5 brand been a successful brand for Variety?

6 A. It has.

7 Q. Do you have any numbers of sales that would reflect  
8 that?

9 A. From 2002 to 2015 we sold over \$64 million worth of  
10 products with The Backyard mark.

11 Q. We're talking about products, correct?

12 A. Yes.

13 Q. Products?

14 A. Correct.

15 Q. Products. Okay. Is it Variety's view that The  
16 Backyard trademark is a valuable trademark?

17 A. Yes.

18 Q. Is that because of the amount of sales?

19 A. That's part of it.

20 Q. And is it also your view that The Backyard  
21 trademark is a strong trademark?

22 A. It is.

23 Q. And why is that?

24 A. Well, we've got several ways of showing that.  
25 First of all, a third party offered to buy the mark from us

1 or pay us a royalty to use the mark. That was back in 1998.  
2 There's a chain of stores, Southern States. They have stores  
3 that are farm and garden and pet stores. And they approached  
4 us about buying the mark from us, buying Backyard from us or  
5 paying us a royalty to use it.

6 Q. All right. Mr. Blackburn, let's take a look at  
7 Plaintiff's Exhibit P-8.

8 MR. PUZELLA: Object, your Honor. It's hearsay.

9 THE COURT: What was the last thing?

10 MR. PUZELLA: The document. Can we take it off the  
11 screen before the jury sees it?

12 THE COURT: What is it?

13 MR. ADAMS: It's just a corporate document of the  
14 plaintiff, your Honor, which the witness can identify.

15 THE COURT: All right.

16 MR. PUZELLA: It's a letter from a third party that  
17 they're offering for the truth of the matter asserted, your  
18 Honor.

19 MR. ADAMS: It's an internal memo, your Honor. It  
20 is not a letter from a third party.

21 THE COURT: Okay.

22 MR. PUZELLA: Reflects a communication from a third  
23 party. It's hearsay.

24 THE COURT: Overruled.

25 MR. ADAMS: Put it back up.

1           Q.     (By Mr. Adams) Can you identify this for the  
2 record, Mr. Blackburn.

3           A.     That is a memo dated September 16, 1998, that was  
4 sent to Linda Nestor --

5           Q.     And who --

6           A.     -- from Debbie Moore. Both of them were employees  
7 of Roses -- of Variety Wholesalers at the time.

8           Q.     Is this a document that has been maintained in  
9 Roses' and Variety's possession, custody and control since on  
10 or about creation of this document?

11          A.     Yes.

12          Q.     And who's Linda Nestor?

13          A.     Linda Nestor was one of the people in our company  
14 who dealt largely with contracts, the administration of  
15 contracts.

16          Q.     And who is Debbie Moore?

17          A.     She worked under Linda Nestor.

18          Q.     This document is dated September 16, 1998. That's  
19 about four or five years after Roses started using The  
20 Backyard trademark; is that right?

21          A.     That's correct.

22          Q.     So just read the body -- one question, though. I  
23 notice in the re line, it says "Backyard Registered  
24 Trademark" but there is no "the" in front of The Backyard.  
25 Does that have any significance to you?



1           A.     Well, our people understood that the key part of  
2 the registration was Backyard. The word Backyard.

3           Q.     But "the" is an article, correct?

4           A.     Yes.

5           Q.     So read the text of that memo.

6           A.     "I received a phone call today from Bob  
7 Desblen" (pronounced -- and then spelled out Day-be-an) -- so  
8 that may be an I. It is. Day-be-an. "Advertising Manager  
9 for Southern States Cooperative Mid-Atlantic States Farm  
10 Stores regarding our registered trademark for Backyard. He  
11 and his company are wanting to know if Roses is interested in  
12 licensing it or selling our registered rights to them. I  
13 told him that I didn't have the authorization to make this  
14 decision, but I would make sure my superiors and legal consul  
15 (sic) were made aware of his request."

16          Q.     Once a decision was made, he wanted to be informed;  
17 is that right?

18          A.     Yes.

19          Q.     Did Roses, in fact, consider selling The Backyard  
20 trademark?

21          A.     We briefly considered it, but we decided against it  
22 because we couldn't think of a better name to use on our own  
23 products. We would have -- by the end, we were expanding it  
24 to more and more products and we would have had to come up  
25 with some other name and we couldn't really think of a better

1 name.

2 MR. ADAMS: Plaintiff moves Exhibit P-8 into  
3 evidence, your Honor.

4 THE COURT: It's received.

5 **(Plaintiff's Exhibit No. P-8 received into evidence)**

6 Q. (By Mr. Adams) And this document was furnished to  
7 Walmart some years ago, was it not?

8 A. Correct.

9 Q. Did Roses ever license The Backyard trademark to  
10 Southern States?

11 A. No, we didn't.

12 Q. Has it ever licensed the trademark to anyone?

13 A. No.

14 Q. Why does the contact from Southern States support  
15 Variety's view that the trademark, Backyard trademark, is a  
16 valuable trademark?

17 A. Well, they were offering to either pay us a royalty  
18 on what they sold using it or to buy it outright. And this  
19 wasn't when we were in bankruptcy, when they might think they  
20 could get it for a song. This was after we were out of  
21 bankruptcy, we were part of Variety Wholesalers, which had a  
22 strong balance sheet. So they were not talking about just  
23 picking it up on the side.

24 Q. So, Mr. Blackburn, do you have any other evidence  
25 that The Backyard trademark is valuable in the marketplace?

1           A.     Yes.  The evidence of other retailers who have, in  
2 fact, tried to use it.

3           Q.     For example?

4           A.     Fred's, which is a chain of stores -- they're based  
5 in Memphis, Tennessee.  They're west of here.  But they're  
6 about the same size as Roses Stores, sell the same things.  
7 Many of the Fred's stores have pharmacies in them, too, as  
8 well.  That's an extra feature.  But Fred's, they developed a  
9 line of grills and they called it Backyard Traditions and  
10 they started selling those grills and, of course, our buyers  
11 found out about it and brought it to my attention.

12          Q.     All right.  Turn to Plaintiff's Exhibit P-2, Mr.  
13 Blackburn.  Could you identify that for the record?

14          A.     This is what's called a cease and desist letter.  
15 It's a letter that when you find out your trademark is being  
16 infringed, your attorney sends a letter to the company that's  
17 infringing it and telling them that we own the rights to that  
18 mark and to stop selling products using our mark.

19          Q.     So this letter did, in fact, go to Fred's; is that  
20 correct?

21          A.     It did.

22          Q.     And what happened next?

23          A.     They stopped using it.  They had already had grills  
24 manufactured for -- under the use with Backyards on them, and  
25 we let them know that it was okay to sell through the ones

1 they had already manufactured, but that after they sold all  
2 those, they weren't to order any new ones and that's what  
3 they did.

4 Q. Does the decision --

5 MR. ADAMS: Plaintiff moves P-2 into evidence, your  
6 Honor.

7 THE COURT: Received.

8 **(Plaintiff's Exhibit No. P-2 received into evidence)**

9 Q. (By Mr. Adams) Does the decision by Fred's to stop  
10 using the rights to The Backyard trademark indicate anything  
11 to you about the value of The Backyard trademark?

12 A. Well, it showed that they knew that -- first of  
13 all, as to its value, they considered it a very good name to  
14 put on grills and to use and so that's why they did that, but  
15 it also showed that they recognized that we had the rights to  
16 that mark and they stopped using it.

17 Q. Mr. Blackburn, do you have any further evidence  
18 that The Backyard mark is valuable in the marketplace?

19 A. Another retailer decided to use Backyard on  
20 grilling products and that was Harris Teeter. They opened a  
21 little section in their stores and had Backyard in it and  
22 sold grilling supplies in there. So we found out about that  
23 and contacted them, contacted our attorney, sent them a  
24 letter and they agreed to stop. They took down the banner  
25 and stopped using Backyard in their stores.

1           Q.     All right. Mr. Blackburn, similar to Harris  
2     Teeter, Fred's and Southern States, do you have any evidence  
3     that Walmart considers The Backyard mark to be valuable?

4           A.     Yes, there's quite a lot of evidence about that.  
5     Obviously, that's what we're here for. They thought Backyard  
6     was a good name to put on their grills and grill accessories.

7                     And so in 2000, after doing some studies, consumer  
8     studies where they compared a whole bunch of names to each  
9     other, some of which are very famous names like George  
10    Foreman Grills or Weber, they compared Backyard to these  
11    other names and compared it to their own name. They were  
12    using Mainstay. They compared it to Sam's Choice. And they  
13    ultimately decided that Backyard is what they wanted -- the  
14    name they wanted on their grills and grill accessories and  
15    that's what they do.

16          Q.     Now --

17                  MR. PUZELLA: Move to strike, your Honor. There's  
18    no foundation for his knowledge concerning Walmart's  
19    activities. None.

20                  THE COURT: Disallow that testimony. All right.

21          Q.     (By Mr. Adams) All right. Mr. Blackburn, let's  
22    take a look at Plaintiff's Exhibit -- Demonstrative Exhibit  
23    PX-1. Can you identify this document?

24          A.     Walmart provided us with their -- in this  
25    proceeding with their sales of products that had Backyard on

1 it. And this runs from October 8, 2011, which is the date  
2 they told us they first started selling products with  
3 Backyard on them, through November 21, 2015, and so it shows  
4 week by week the sales that they had. As you can see, there  
5 is a seasonal spike during the months from March through  
6 August of each year when -- the high sales point for those  
7 numbers.

8 MR. PUZELLA: Objection again, your Honor. There's  
9 no foundation for this witness to be able to testify about  
10 Walmart's documents and its data.

11 THE COURT: Sustained.

12 MR. ADAMS: Your Honor, this -- this document and  
13 these exhibits have been stipulated to. This is a simply  
14 demonstrative exhibit created based on Walmart's own  
15 information they furnished in this lawsuit, and Mr. Blackburn  
16 is not -- he has been dealing in trademarks for 30, 40 years  
17 and perfectly competent under Rule 701 to examine this chart  
18 and explain what he sees.

19 MR. PUZELLA: This witness is not an expert in this  
20 document and underlying documents. This is a summary,  
21 Federal Rule of Evidence 1006 summary. It is not the subject  
22 of this trial which only concerns liability.

23 MR. ADAMS: It definitely concerns the strength of  
24 the trademark, your Honor, and exactly why it's being  
25 offered, to show the strength of the trademark and it was

1 offered in response to my question to Mr. Blackburn --

2 THE COURT: All right. Do you have a lot more  
3 questions with this witness or are we almost finished?

4 MR. ADAMS: I'm sorry?

5 THE COURT: Do you have a lot more questions for  
6 this witness or are we almost finished with him?

7 MR. ADAMS: We are not almost finished.

8 THE COURT: We're not?

9 MR. ADAMS: I would say another 30 to 45 minutes.

10 THE COURT: Well, I've been very passive in letting  
11 you go on with loads of stuff that was just unnecessary.  
12 We'll take a recess and this objection is sustained.

13 (Recess at 3:07 p.m. to 3:20 p.m.)

14 THE COURT: Okay. Continue with your direct.  
15 Any more questions?

16 MR. ADAMS: Yes, your Honor.

17 Q. (By Mr. Adams) Mr. Blackburn, did Variety ever  
18 give Walmart permission to use its Backyard trademark?

19 A. It did not.

20 Q. Did Walmart ever ask Variety for permission to use  
21 The Backyard trademark?

22 A. Not that I'm aware of.

23 Q. Do you know when Variety (sic) became aware of  
24 Variety's Backyard trademark?

25 A. They became aware of it in early 2011.

1 Q. And how do you know that?

2 A. Karen Dineen, one of their employees that's been  
3 referred to in the opening statements, testified that that  
4 was when they became aware of it.

5 MR. PUZELLA: Objection, your Honor. Again,  
6 there's no foundation for this testimony. He's giving  
7 testimony about Mrs. Dineen, who's a Walmart employee.

8 THE COURT: Overruled.

9 Q. (By Mr. Adams) Mr. Blackburn, in Walmart's answer,  
10 paragraph 39, read the very top three lines of that document.

11 A. "Walmart admits that it was aware of plaintiff's  
12 United States trademark registration number 1,847,503 at the  
13 time it adopted The Backyard Grill + Design mark. Walmart  
14 denies the remaining allegations of paragraph 39."

15 Q. Mr. Blackburn, assume that Walmart says that it  
16 knew that Variety was using The Backyard trademark as the  
17 name of its lawn and garden center but did not know that it  
18 was using The Backyard trademark on products such as grills  
19 and grill accessories. Was there any way for Walmart to find  
20 out how Variety was using The Backyard trademark?

21 A. Yes. Obviously, I testified earlier that you can  
22 go on the trademark office's website and you can access those  
23 documents. It's easy, quick, can be done. They could have  
24 seen the specimens that we filed that showed products we were  
25 using it on and made it absolutely clear that we were using



1 it on products.

2 Q. Including grills, correct?

3 A. Yes, including grills.

4 Q. Now, suppose Walmart says that it knew that Variety  
5 was using The Backyard -- I'm sorry, strike that.

6 Even if that information had somehow gotten past  
7 all Walmart's lawyers and executives, was there another way  
8 that Walmart could have learned how Variety was using The  
9 Backyard trademark?

10 A. Sure. The home office calls one of the stores  
11 that's near a Roses and says, go check it out. Tell us  
12 what -- go see what kind of Backyard products -- how they're  
13 using Backyard in their store and call us back and tell us.

14 Q. Is there typically a Walmart near most Roses  
15 Stores?

16 A. Yes. They're saturated throughout our sales area  
17 and in Henderson the store is less than a mile from -- the  
18 Walmart store is less than a mile from the Roses store and  
19 here in Elizabeth City it's about four miles away.

20 MR. ADAMS: Your Honor, plaintiff moves P-62 into  
21 evidence.

22 THE COURT: It will be received.

23 **(Plaintiff's Exhibit No. P-62 received into evidence)**

24 Q. (By Mr. Adams) What if Walmart says they don't  
25 consider Roses to be a competitor of Walmart?

1           A.     They file an annual report which they're required  
2     to file with the Securities and Exchange Commission and in it  
3     they have to describe their competition, and in their annual  
4     reports they say that they face intense competition from  
5     regional variety stores, and that's exactly what we are, a  
6     regional variety chain of stores.

7           Q.     Mr. Blackburn, have you been involved in this  
8     lawsuit ever since it was filed?

9           A.     Yes.

10          Q.     And before this lawsuit was filed there was also a  
11     proceeding for a short period of time in the Patent and  
12     Trademark Office, correct?

13          A.     That's correct.

14          Q.     All right. And has it been your role as Variety's  
15     sole in-house counsel to monitor the status of the trademark  
16     opposition and the lawsuit?

17          A.     Yes.

18          Q.     And have you reviewed documents and pleadings and  
19     so forth that have been filed in this case?

20          A.     Yes.

21          Q.     And with particular regard to the issue of  
22     Walmart's knowledge of its -- Variety's sales at various  
23     times like during the trademark proceeding, litigation, have  
24     you studied documents that inform you about Walmart's  
25     commercial activities during those particular time periods?

1           A.     Yes.

2           MR. ADAMS:   And bring up PX-2.

3           Q.     (By Mr. Adams)   Has someone under your supervision  
4 and control prepared an exhibit which explains Walmart's  
5 commercial activities during various stages of this lawsuit  
6 as it relates to Walmart's sales activities?

7           A.     Yes.

8           MR. PUZELLA:   Objection, your Honor.

9           THE COURT:   Overruled.

10          Q.     (By Mr. Adams)   Is that what this document is?

11          MR. PUZELLA:   Objection to the document, your  
12 Honor.

13          THE COURT:   Overruled.

14          Q.     (By Mr. Adams)   All right.   Just briefly, Mr.  
15 Blackburn, explain what we're showing here.

16          A.     Well, on this chart, particularly those arrows that  
17 you're seeing are showing the introduction of products into  
18 commerce using Backyard that Walmart sold.

19          Q.     And what are UPCs?

20          A.     UPCs are barcodes and this -- they identify  
21 individual products.   That's how retailers are able to track  
22 what's sold, when you're out of something in the store.   It's  
23 called an SKU, stock keeping unit.   And each of these lines  
24 represents a different stock keeping unit, a different  
25 product that The Backyard name was being applied to by

1 Walmart.

2 Q. All right. Now, what does the top bar represent?

3 A. The top bar with the arrows is showing all the  
4 Walmart SKUs that were added, the new products they put the  
5 name on, after we went into the trademark office and objected  
6 to their trying to register Backyard Grill as a mark. We  
7 found out about that -- I found out about it when the -- in  
8 May of 2012 I found out that Walmart was selling Backyard  
9 Grills, and so I contacted our outside counsel to tell them  
10 about it and they found out that Walmart had a proceeding  
11 going on in the Trademark Office to register Backyard marks.

12 And, of course, as I explained earlier in the  
13 registration of our mark, if you feel that you're going to be  
14 injured by registration of the mark, you can come in and  
15 object and the Trademark Office has a proceeding that you can  
16 go to.

17 So we objected. And we entered into the proceeding  
18 there in the Trademark Office and that happened in 2012 long  
19 about -- around June or August we entered into that. And in  
20 that proceeding they got to get discovery from us, so they  
21 asked us for all kinds of discovery which I gathered  
22 together. I mean, I personally gathered it together. I went  
23 to each office and got it from where it was. I got tabs, I  
24 got the various things together, put them together, produced  
25 them to our attorneys to deliver them to Walmart.

1           And those documents that we produced to them and in  
2 the deposition I gave and that Mike Burgess gave that they  
3 took, we described exactly what products we were using it on  
4 and that we were using it on grills. So there was no way  
5 they didn't know at that point that we were using -- that  
6 Backyard we had been using on grills and have used it since  
7 1993. They knew that for a fact.

8           And what the chart is showing you, that despite  
9 that, they didn't just sell through what they already had got  
10 the way Fred's did, what they did was apply it to more and  
11 more. They said let's go full steam ahead. They applied it  
12 to more and more products and sold more and more units of  
13 them and kept reordering them despite knowing for an  
14 absolute, indisputable fact that that's what we were using  
15 them on. So that was in the Trademark Office.

16           Now, I've practiced law for 40 years. This was a  
17 shock to me. I thought it was all a mistake. I thought  
18 someone at Walmart slipped up and they didn't know what was  
19 going on. And once we went into the trademark office and  
20 explained so that they absolutely knew what we were using it  
21 on, they would back off like Fred's did or like Harris Teeter  
22 did. And I could not have conceived that the result of that  
23 would be, no, they're not going to back off, they're going to  
24 put it on more and more products and sell more and more of it  
25 and order more and more units of it.

1 Q. All right. Let's look --

2 A. And that's exactly what that is showing.

3 Q. I didn't mean to interrupt. Let's look at the bar  
4 in the middle. What does that --

5 A. The bar in the middle is showing the products they  
6 added the name to after we produced to them in the trademark  
7 proceeding, we produced those tabs and those other things  
8 that showed we were using it on grills.

9 Q. All right. And then the bottom bar?

10 A. That's what -- okay. So I thought in the trademark  
11 proceeding they would back off. That didn't happen, so we  
12 finally had to file a lawsuit. And even after we filed the  
13 lawsuit, they kept adding it to more and more products and  
14 selling more and more of them.

15 MR. ADAMS: Your Honor, plaintiff moves Exhibit  
16 PX-2.

17 THE COURT: Received.

18 **(Plaintiff's Exhibit No. PX-2 received into evidence)**

19 MR. PUZELLA: Object, your Honor. Move to strike  
20 all of that testimony. The testimony is obviously intended  
21 to demonstrate the continued sale after learning --

22 THE COURT: You don't have to have a closing  
23 argument on every objection. So the answer is no, and you  
24 can sit down. And guess what, in a little while you're going  
25 to get to cross-examine him and then you can do all of that,

1     okay?

2                 MR. PUZELLA:   Thank you, your Honor.

3                 THE COURT:    Thank you so much.

4                 Q.     (By Mr. Adams)   Mr. Blackburn, turn to Plaintiff's  
5     Exhibit 3.   I'm sorry, PX-3.

6                 MR. PUZELLA:   Same objection.

7                 THE COURT:    Same ruling.

8                 Q.     (By Mr. Adams)   Mr. Blackburn, can you identify  
9     this document?

10                A.     Yes.   This document is based on -- it was prepared  
11     at my request and under my supervision, was prepared to show  
12     the dollar amount of the goods that were sold at the various  
13     points in all this controversy between us and Walmart.

14                Q.     What does this have to do with Walmart's  
15     willfulness or intention in carrying out their new grill  
16     brand?

17                A.     Well, it shows just how intentional and willful it  
18     was.   It shows that they sold \$770 million worth of Backyard  
19     goods after we entered the trademark proceeding and sold --  
20     \$728 million of those sales were sold after we put in their  
21     hands the documents that showed exactly what we were using  
22     the mark on.   And it shows that -- of that amount,  
23     \$435 million worth of goods were sold after we went on and  
24     filed the lawsuit.

25                Q.     All right.   Let's now look at PX-4.

1 MR. ADAMS: Plaintiff moves Exhibit PX-3, your  
2 Honor.

3 THE COURT: Received.

4 **(Plaintiff's Exhibit No. PX-3 received into evidence)**

5 Q. (By Mr. Adams) Now PX-4, Mr. Blackburn.

6 A. This is that same information from before which was  
7 in terms of dollars. This is the number of units that were  
8 put into commerce with Backyard name at those same various  
9 points. After we entered the trademark proceeding, they sold  
10 91 million units of goods that had Backyard on it, and they  
11 sold 83 million units that had Backyard on them after we  
12 produced to them the evidence of what we were using it on and  
13 50 million units after we filed the lawsuit.

14 Q. All right.

15 MR. ADAMS: Plaintiff moves PX-4, your Honor.

16 MR. PUZELLA: Same objection, your Honor.

17 THE COURT: Overruled. It's received.

18 **(Plaintiff's Exhibit No. PX-4 received into evidence)**

19 Q. (By Mr. Adams) Now, let's go to Plaintiff's  
20 Exhibit PX-5, Mr. Blackburn. Looking at Plaintiff's  
21 Exhibit 5, Mr. Blackburn, can you explain to the jury what's  
22 being shown here?

23 A. These are a variety of ways we've used The  
24 Backyard, the registered mark, in commerce.

25 Q. So let's go at them one at a time. Starting in the



1 upper left-hand corner.

2 A. The upper left-hand corner is one of our grills.  
3 And it's hard to read, but above Backyard is "The." And  
4 after Backyard there's an R in a circle right after the D in  
5 it. And BBQ is underneath Backyard. This is a metal plate  
6 that's affixed to the grill.

7 Q. And below that?

8 A. Below that is The Backyard with Barbecue under it  
9 with R after the D on Backyard. And this is a red and black  
10 version that we use to -- on our packaging for Backyard  
11 grills.

12 Q. And the two on the right?

13 A. The one at the top is -- well, the one at the  
14 bottom was the original colors that we used with that logo  
15 that we had developed, but here again, the registered thing  
16 is The Backyard and that's what's shown in the middle of the  
17 circle. And then we changed the colors later to show The  
18 Backyard.

19 MR. ADAMS: Plaintiff moves PX-5, your Honor.

20 THE COURT: It's received.

21 **(Plaintiff's Exhibit No. PX-5 received into evidence)**

22 Q. Now, Mr. Blackburn, can you describe how a customer  
23 would encounter these Backyard marks in a Roses store or one  
24 of the other stores owned by Variety?

25 A. Well, when they come in the front door, we might

1 have one of these tabs there that they could look at and that  
2 would have those products advertised in them.

3 When they go back to that section of the store, the  
4 lawn and garden section, sometimes there's a cardboard stand  
5 there, display stand that would have The Backyard on it. And  
6 then it might be rakes and hoses and different kinds of  
7 implements in it.

8 On the shelves themselves might be what's called a  
9 shelf talker, which is a little sign on the shelves that  
10 tells you things about the products there in that section of  
11 the store.

12 And then there are the boxed items and packaged  
13 items that are displayed on the shelves that have Backyard  
14 printed on them. And there might be a grill set up back  
15 there that would be just like that one you see up there that  
16 has a metal plate with The Backyard affixed to it.

17 MR. ADAMS: Your Honor, I need just a minute. We  
18 have a couple of boxes -- actual grills that we're going to  
19 have Mr. Blackburn open. So with the Court's indulgence, we  
20 would like to get them out front and we'll open them quickly.

21 THE COURT: What are you doing now?

22 MR. ADAMS: We would like to open two of the boxes  
23 that have the actual grills in them, your Honor.

24 THE COURT: I don't think you get to do that.

25 MR. ADAMS: Okay. I would like to show Mr.

1 Blackburn the actual boxes for his testimony.

2 THE COURT: I mean --

3 MR. ADAMS: Your Honor, I want to illustrate one of  
4 the ways that the product is advertised and that's the  
5 packaging. It won't take 30 seconds.

6 THE COURT: All right. Go ahead.

7 So is there a cheaper line of merchandise in the  
8 lawn and garden and grill area than Backyard?

9 THE WITNESS: I don't think so, your Honor.

10 THE COURT: It's the bottom level?

11 THE WITNESS: It's the level that's meant to be the  
12 biggest savings.

13 THE COURT: Right. And so there's not something  
14 that says Roses grill or Roses product. It's -- The Backyard  
15 is the equivalent of Roses?

16 THE WITNESS: Right. Now, there may be some items  
17 that we don't have Backyard on that just --

18 THE COURT: They're blank.

19 THE WITNESS: Well, they have the label that -- the  
20 manufacturer, yes. They're not well-known, but they're the  
21 same manufacturers that make other things for us.

22 THE COURT: Okay.

23 Show him --

24 MR. SHAW: Okay.

25 MR. LONG: This is Exhibit 6.

1           A.     So there -- this is our Backyard grill, which you  
2     can see is a black metallic one just like the one in the  
3     picture up there, and there you see "The Backyard" up there  
4     on the -- at the top and you see the R up close, you can see  
5     the R after the D of Backyard. And the colors are red and  
6     black.

7           THE COURT: Do you think anybody ever goes into  
8     Roses with the -- written down on their note, buy the label  
9     Backyard Barbecue, or they just go into Roses because they  
10    know it's the cheapest place next to The Dollar Store and  
11    they buy the cheapest product and walk out because that's  
12    what Roses does?

13          THE WITNESS: Well --

14          THE COURT: It's like generic. It's totally  
15    generic, isn't it?

16          THE WITNESS: Well, they are not just interested in  
17    the cheapest product. They do want something that's going to  
18    hold up.

19          THE COURT: If they want the cheapest product, they  
20    might go to Dollar General or The Dollar Store, something  
21    that sneaks in under Roses.

22          THE WITNESS: But they did want to know that it  
23    holds up and that's where the name comes in. If they bought  
24    some of our Backyard things and they were satisfied with  
25    that.

1 THE COURT: Do you think they really care, like  
2 they see quality or uniqueness in that? I mean, in the name  
3 Backyard?

4 THE WITNESS: I think so because --

5 THE COURT: Really?

6 THE WITNESS: -- one of the people on this jury  
7 being interviewed, she said that value was a big thing for  
8 her but she wanted the thing to have quality. And so they  
9 are -- you'd be surprised --

10 THE COURT: It's the bottom. You don't have  
11 anything below this. It's like that's where you start.

12 THE WITNESS: It is the lowest one, and we think we  
13 don't sell shoddy merchandise in our store. But the customer  
14 is looking for that. They want to know that the product is  
15 one they can rely on.

16 THE COURT: Okay.

17 A. This is The Backyard grill that Walmart sells and  
18 as you can see on the end here that's towards me, you can  
19 note -- if you turn that -- the edge of it -- you can  
20 actually see the grill and it's the same kind of grill.  
21 Looks very -- almost identical to our grill. And the colors,  
22 again, are red and black. The Backyard is shown on it. And  
23 so as you can see, they're very similar.

24 MR. ADAMS: Your Honor, plaintiff moves Exhibits  
25 P-6 and P-7 into evidence.

1 THE COURT: They're received.

2 **(Plaintiff's Exhibit Nos. P-6 and P-7 received into evidence)**

3 MR. SHAW: If I may.

4 (Plaintiff's counsel conferring briefly at counsel table off  
5 the record)

6 Q. (By Mr. Adams) Mr. Blackburn, I want you to note  
7 the placement of the TM after Backyard and before the word  
8 Grill.

9 A. Yes.

10 Q. First of all, what does the TM refer to?

11 A. TM is a mark that you put when you're claiming  
12 trademark rights in a name before you've registered it in the  
13 trademark office. So that's to notify people that you're  
14 claiming a trademark right in that name or that word.

15 Q. And what does the use of the word TM tell you about  
16 Walmart's trademark claim?

17 A. Well, they placed it not after grill, they placed  
18 it after Backyard. In fact, grill is on the next line and  
19 it's not down there. They put TM after Backyard. Well,  
20 that's because you can't get a trademark on grill. You can  
21 only get it on some word that's not descriptive. And so they  
22 put the TM after Backyard because that's -- that's what  
23 they're claiming the trademark right in and it's just that  
24 word, Backyard.

25 MR. ADAMS: Your Honor, if you bear with me

1 one minute, I'm going to try to streamline what I have left,  
2 which is not too much. (Perusing documents).

3 Q. (By Mr. Adams) Mr. Blackburn, has Variety ever  
4 conducted any studies to determine where else Roses'  
5 customers shop?

6 A. Yes.

7 Q. Would you take a look at P-87(A) and 87(B).

8 A. 87(A) is a study that was done in April 2009 by  
9 America's Research Group, and they were giving us information  
10 about our customers and where they shop and what -- various  
11 information that would be useful to us and prepared a report  
12 for us. And with respect to where else they shop, this  
13 report states that of those who said Roses is their secondary  
14 store to shop, 52 percent said Walmart is their primary store  
15 to shop.

16 Q. And what does that say about the status of Roses  
17 and Walmart as competitors?

18 A. Well, obviously they're direct competitors.  
19 52 percent of the people who shop in our store shop at  
20 Walmart in this survey.

21 Q. And 87(B)?

22 A. 87(B) is a similar study that was done in May of  
23 2012, and that study reported that of those who shop at  
24 Walmart -- wait a minute. This one shows primary ones  
25 that -- of those who shop at Roses, the primary store to shop

1 for items sold at Roses, Roses Express, 42.7 percent their  
2 secondary store was Walmart.

3 Q. All right. Mr. Blackburn, are Walmart's Backyard  
4 products and Variety's Backyard products ever sold close to  
5 each other?

6 A. Well, they're certainly not sold in the same store.  
7 We sell ours in our store and they sell theirs in their  
8 store. But they're close in the sense that, as I said  
9 earlier, the Walmart store in Henderson is less than a mile  
10 from the Walmart store in -- from the Roses store in  
11 Henderson and here in Elizabeth City it's less than  
12 four miles.

13 MR. ADAMS: Your Honor, plaintiff moves P-87(A) and  
14 P-87(B) in evidence.

15 THE COURT: It will be received.

16 **(Plaintiff's Exhibit Nos. P-87(A) and P-87(B) received into**  
17 **evidence)**

18 Q. (By Mr. Adams) Mr. Blackburn, how would a customer  
19 encounter both Backyard trademarks?

20 A. Well, they might be shopping in our store for  
21 something that they particularly went to get and see The  
22 Backyard grill that we sell there and then go over to the  
23 Walmart store for something else they're looking for and  
24 they'll see a Backyard grill there too. So they would see  
25 two Backyard grills in the same day or day or so apart.



1           Q.     Is there anything of significance about the way the  
2 trademarks are displayed?

3           A.     Well, in terms of the customer remembering it,  
4 they're not going to remember grill or they're not going to  
5 remember barbecue because that's what the product is. If  
6 they're remembering the name of the thing, they're going to  
7 remember it's Backyard, and it's the same name at both  
8 stories.

9           THE COURT: They're not going to be able to go into  
10 Lowe's or ACE Hardware or one of those shops and find either  
11 of these items, are they?

12           THE WITNESS: They are not.

13           THE COURT: Because they're not marketed anywhere  
14 except in the proprietary setting of Roses and Walmart.

15           THE WITNESS: Correct, your Honor.

16           Q.     (By Mr. Adams) Mr. Blackburn, what about after  
17 purchase, would consumers ever encounter both trademarks?

18           A.     Well, they may well -- some neighbor visiting  
19 another neighbor and one of them's bought Backyard from one  
20 store and one's bought it from another and they notice that  
21 both of them are Backyard.

22           Q.     Now, Mr. Blackburn, having looked at the two boxes,  
23 did you see -- do you see any similarities between Variety's  
24 trademark and Walmart's trademark?

25           A.     Well, they're identical. The TM after Backyard on

1 Walmart comes right -- it comes right after Backyard and the  
2 registered mark on the Roses mark comes right after Backyard.  
3 They're both claiming the same word is their trademark, only  
4 ours is the one -- ours is the real one. Ours is the one  
5 that was registered in the trademark office.

6 Q. Now turn to PX-8, Mr. Blackburn. Can you identify  
7 PX-8?

8 A. This is a comparison list of the items that we sell  
9 under The Backyard mark in the left-hand column, and the  
10 right-hand column is items that Walmart sells under The  
11 Backyard name.

12 Q. Now, who has the larger list of products being sold  
13 under The Backyard trademark?

14 A. We do, because we use it for our whole lawn and  
15 garden department where they use it just for a subset.

16 MR. ADAMS: Your Honor, plaintiff moves PX-8 into  
17 evidence.

18 THE COURT: It will be received.

19 **(Plaintiff's Exhibit No. PX-8 received into evidence)**

20 Q. (By Mr. Adams) Mr. Blackburn, during the four  
21 years -- during a four-year period during which Walmart was  
22 selling Backyard products, do you know of any Variety's  
23 customers ever reporting confusion between Variety's products  
24 and Walmart's products?

25 A. No, and I don't see how it's possible that we would

1 know.

2 Q. Well, let me just ask you, is there any practical  
3 way to know the answer to that question?

4 A. No. If, for instance, let's say a customer comes  
5 in bringing a Walmart Backyard grill and they bring it to  
6 Roses, they're confused, they felt they bought it there. And  
7 they take it to our customer service desk and show it to the  
8 customer service person there and she tries to ring it up and  
9 she says, well, that's not one of our SKUs. You must have  
10 bought that someplace else.

11 So how does that ever get known in the home office?  
12 How does what that customer service representative just  
13 encountered there ever get up to the buyer in the buying  
14 office in the home office? Even if it were to happen right  
15 there in Henderson, the chances that that would ever get from  
16 that level up to -- the clerks in the stores are not dealing  
17 with the buyers who buy the products and the people who are  
18 involved with the marketing of that. They're just the clerks  
19 in the stores and that's who the customer is going to bring  
20 it to.

21 Q. Does Variety have any specific procedure in its  
22 stores to transmit information of that type from customer  
23 service representatives up to the home office?

24 A. No, we do not. We have no procedure in place. And  
25 even if we had one in place, one of the problems is that the

1 clerk down there would not understand why that was important.  
2 The clerk in our store doesn't know there's a lawsuit going  
3 on here between us and the clerk in the store wouldn't know  
4 what the significance of somebody having found a Backyard  
5 grill in another store would be. It's just not something  
6 they deal with.

7 Q. Mr. Blackburn, I believe you said earlier that  
8 Variety obtained an incontestable trademark. Can you explain  
9 why that is so important to Variety?

10 A. Well, obviously we were investing a lot of time and  
11 effort and money in developing a particular mark that was  
12 going to help us compete against Walmart. That was really  
13 how it came out. And it was going to be our line that was  
14 only available in our store, so it was important that it  
15 couldn't be taken from us and used elsewhere because it was  
16 supposed to draw people to our stores. And, lo and behold,  
17 what happened, the very people we wanted to compete with  
18 using that are the very people who took the mark and then put  
19 it on their goods.

20 Q. Do you believe that Variety's stores have been  
21 harmed by Walmart's use of Roses' Backyard trademark?

22 A. Yes. Certainly.

23 Q. In what respect?

24 A. Well, the mark is -- Walmart has sold something  
25 like 108 million units. They flooded -- that's like one for

1 every third American. And so if a customer thinks of  
2 Backyard, oh, yeah, you get that at, fill in the blank. It's  
3 not Roses, it's Walmart. That's where they know that name.

4 Q. And how did Roses' or Variety's sales compare to  
5 Walmart's in The Backyard area?

6 A. Well, I told you we sold \$64 million, which is  
7 significant for us, in the period from 2002 to 2015, whereas  
8 they've sold nearly a billion dollars' worth in a four-year  
9 period.

10 Q. So Mr. Blackburn, in most parts of the United  
11 States, if someone did recognize the significance of The  
12 Backyard trademark, who would they likely think it belonged  
13 to?

14 A. They would think it belonged to --

15 MR. PUZELLA: Objection. Foundation. This witness  
16 has no basis for knowing that.

17 THE COURT: Agreed. It's sustained.

18 MR. ADAMS: Just one minute, your Honor.

19 (Plaintiff's counsel conferring briefly at counsel table off  
20 the record)

21 Q. (By Mr. Adams) Mr. Blackburn, were you surprised  
22 that Walmart did not seek Variety's permission to use The  
23 Backyard trademark?

24 A. Yes. I was not just surprised, I was shocked and  
25 dismayed.

1 Q. And were you surprised when they didn't stop after  
2 we objected?

3 A. Yes. Obviously Fred's stopped, Harris Teeter  
4 stopped. Walmart not only didn't stop, they poured on the  
5 steam.

6 MR. ADAMS: No more questions, your Honor.

7 THE COURT: Cross.

8 MR. PUZELLA: Thank you, your Honor.

9 May we have a moment to hand up some binders? Your  
10 Honor, may we hand binders to the jury of the exhibits so  
11 that they don't have to rely on the screen if they choose or  
12 would you prefer just the screen?

13 THE COURT: Yes. We're a simple court here. Less  
14 is more.

15 MR. PUZELLA: So just the screen?

16 THE COURT: Yes. Let's use the screen.

17 MR. PUZELLA: May I approach?

18 THE COURT: You may.

19 (Attorney Puzella providing an exhibit binder to the witness)

20 **CROSS-EXAMINATION**

21 BY MR. PUZELLA:

22 Q. Mr. Blackburn, what are the trademarks that Variety  
23 contends are infringed in this case? Is there more than one?

24 A. There is the registered trademark, The Backyard,  
25 and then reasonable variations of it based on that word

1 "Backyard."

2 Q. And does Variety contend that the reasonable  
3 variations that you just described are themselves trademarks  
4 that are protectable?

5 A. My understanding of trademark law is that it  
6 extends to those reasonable variations once you have  
7 registered it.

8 Q. Excuse me, I didn't mean to interrupt. I'm asking  
9 a slightly different question. Does Variety contend it has  
10 more than one trademark at issue in this case?

11 A. The trademark we are claiming is the trademark of  
12 Backyard. The Backyard and its reasonable variations.

13 Q. So it's just the trademark The Backyard and not  
14 Backyard BBQ as a separate trademark, correct?

15 A. That's a variation of The Backyard.

16 Q. So could you please tell us, does Variety contend  
17 that it has separate trademark rights in Backyard BBQ  
18 separate from the registered The Backyard for lawn and garden  
19 services?

20 A. We would claim any uses for the "the" that's been  
21 left off of -- from before Backyard that we would have common  
22 law rights that -- based on the fact that we've used it going  
23 back to 1993.

24 Q. So could you explain what common law rights are?  
25 To my ear as a lawyer, it sounds like you're saying you're

1     contending that there are separate trademark rights in  
2     Backyard BBQ. Would you clarify that for the jury, please.

3           A.     My understanding -- and I'm not an expert in this  
4     field. My understanding is that you acquire rights simply by  
5     using something in commerce. You can acquire rights in a  
6     mark by using them in commerce over a period of time.

7           Q.     So based on that understanding -- you're the  
8     corporate representative for Variety in this case -- does  
9     Variety claim that there's more than one trademark that's  
10    been infringed?

11          A.     We're claiming if anytime it's been used without  
12    the "the," that we have rights in that as well.

13          Q.     So, in effect, Variety is claiming rights in the  
14    word Backyard by itself; is that accurate?

15          A.     Yes, if we've used Backyard by itself in other  
16    ways.

17          Q.     You had your deposition taken in this case in 2014;  
18    is that correct?

19          A.     That's correct.

20          Q.     And at that time, in 2014, you testified that you  
21    did not personally recall any uses of Backyard BBQ by Variety  
22    as a trademark, right?

23          A.     Yes, I did.

24          Q.     So as you described earlier today, the senior-most  
25    legal employee at the company and you're responsible for the



1 company's trademarks. That's your testimony from earlier  
2 today, correct?

3 A. Yes. But that was not saying that there weren't  
4 such uses. See, I don't --

5 Q. You are not --

6 MR. ADAMS: Objection. Let him finish his answer,  
7 your Honor.

8 Q. (By Mr. Puzella) Go ahead.

9 A. I'm the company's general counsel. I am not the  
10 marketing person. I am not the -- I am not the buyer, I am  
11 not the one who sets up all the ads. I don't know personally  
12 all the ads we've done. I just can't testify to that. I  
13 don't deal with them on a daily basis. I deal with them when  
14 they get registered or when they get infringed. I don't deal  
15 with how they may be used on a day-to-day basis in every  
16 circumstance.

17 I can say that from my examination of the materials  
18 we produced in the trademark office proceeding, every time I  
19 looked at it, at first I thought, well, here's some that have  
20 Backyard without "the," but when we get clearer images of  
21 those things, every single time I looked at it, "the" was  
22 there. And so -- but I don't know. I can't say that that's  
23 true in every single circumstance. And so --

24 Q. But --

25 A. -- for those circumstances where we may not have

1     used "the," yes, we still claim that Backyard is -- we would  
2     have common law rights in that.

3           Q.     In any event, in 2014 when your deposition was  
4     taken, you didn't have any personal knowledge about Variety's  
5     use of Backyard BBQ as a trademark, correct?

6           A.     Correct.

7           Q.     Over the course of your testimony today you  
8     described at great length Variety's process for the  
9     registration of its trademark with the Patent and Trademark  
10    Office. Do you recall that?

11          A.     I do.

12          Q.     And you're familiar with patent and trademark  
13    practices it seems; is that fair?

14          A.     Some of it, yes.

15          Q.     Certainly enough to testify in front of this jury  
16    here today, correct?

17          A.     I understand practically what I've been called upon  
18    in my career to handle in conjunction with outside counsel  
19    that does the actual filing.

20          Q.     And you're aware, you testified previously, that  
21    Walmart applied to register its Backyard Grill with its  
22    little design mark at the Patent and Trademark Office,  
23    correct?

24          A.     Correct.

25          Q.     You're aware of that fact?

1           A.     I am.

2                   MR. PUZELLA:   Could you put up Exhibit D-196,  
3 please.

4           Q.     (By Mr. Puzella) I'm showing you what's been marked  
5 as Exhibit D-196, which is --

6           A.     Do I have that?

7           Q.     You do.   It should be in your binder, sir.

8           A.     Okay.

9           Q.     Do you have it?

10          A.     (Perusing exhibit binder).   I do.

11          Q.     This is Walmart's application for the mark Backyard  
12 Grill.   Do you see that?

13          A.     See mark, Backyard Grill.

14          Q.     I'm sorry, could you read that again, the second  
15 word is grill?

16          A.     G-R-\_-L-L.

17          Q.     And there's a space where the "I" would be,  
18 correct?

19          A.     Correct.

20          Q.     If you could scroll down a bit on the page.   To  
21 search the office's database of marks.   Do you see that?   So  
22 earlier in your testimony of Variety's mark registration  
23 process you discussed the fact that Variety's mark was  
24 compared against other marks on the registry and there were  
25 no marks that the office cited against it so it was allowed

1 to go to publication. Do you remember that?

2 A. Yes.

3 Q. So looking at Walmart's application for its  
4 trademark, what did the trademark office say with respect to  
5 its search of Walmart's trademark on the registry? Could you  
6 read that to the jury, please.

7 A. "The trademark examining attorney has searched the  
8 office's database of registered and pending marks and has  
9 found no conflicting marks that would bar registration under  
10 Trademark Act Section 2(d)," and then there's some other  
11 statutes there.

12 Q. So as of the time that Walmart applied for its  
13 trademark, Variety's The Backyard mark was on the registry.  
14 It was a registered mark, as you pointed out several times  
15 during your testimony, correct?

16 A. That's true.

17 Q. And here it states that the examining attorney at  
18 the trademark office compared Walmart's mark that it was  
19 applying for against the registry and it stated, as you just  
20 read, that there were no competing marks that barred its  
21 registration; is that accurate?

22 A. That's what it says.

23 Q. Thank you.

24 MR. PUZELLA: Just a moment, your Honor. I'm  
25 trying to pare this down.

1           Q.     (By Mr. Puzella)  Would you turn to Exhibit P-78,  
2     please.  It may be in the binder labeled D-186.

3           A.     I found it.

4           Q.     Do you recall testifying about P-78 in your direct?

5           A.     I do.

6           Q.     And if you look at the chart that you testified  
7     about, let's begin year 2000.  You testified that there were  
8     \$40 million -- approximately \$40 million spent in advertising  
9     over this period.  Do you recall that?

10          A.     Yes.

11          Q.     Beginning in 2000, does the advertising for these  
12     products drop off dramatically?

13          A.     Yes.

14          Q.     And in the field several to the right in the  
15     middle, "Backyard Tabs."  Do you see that?

16          A.     Yes.

17          Q.     That's the number of individual tabs or circulars  
18     that contained The Backyard logo to any degree whatsoever,  
19     correct?

20          A.     That's correct.

21          Q.     Okay.  So several years there from 1999 through  
22     2009, The Backyard appeared once, correct?

23          A.     Yes.

24          Q.     And then in 2010, once; 2011, once; and 2012,  
25     twice.  Is that correct?

1           A.     Correct.

2           Q.     Now, on the right hand -- to the right of that  
3     there's a percentage column. And do you see that obviously  
4     for the years where there was no use, the percentage of use  
5     is zero. But for the subsequent uses, there's 33 percent,  
6     17, 17 and 33. Do you see that?

7           A.     Yes.

8           Q.     So are those the percentage of overall tabs that  
9     were circulated that included Backyard?

10          A.     Yes.

11          Q.     So that's not the percentage within the tab that  
12     contained a reference to Backyard, it's just a reference to  
13     the number of tabs that had Backyard in them someplace?

14          A.     Correct.

15          Q.     Correct. Did Variety take the time to try and  
16     assess the degree to which the dollars reflected in the far  
17     right-hand column were directed just at the Backyard mark and  
18     not the entire tab, so the linens and the paper towels and  
19     the laundry soap in the tab?

20          A.     We looked at doing that initially.

21          Q.     But you didn't do it. This is for the entire tab,  
22     correct?

23          A.     Correct. We decided --

24          Q.     So dollars shown here are for all the products in a  
25     given tab, not advertising dollars just directed at Backyard

1 Grill?

2 A. That's correct.

3 MR. PUZELLA: You can take that down. Thank you.

4 Q. (By Mr. Puzella) Now, you also testified that in  
5 August of 2009 Variety sent a letter to a company named  
6 Fred's objecting to Fred's use of the trademark Backyard  
7 Traditions. Do you recall that?

8 A. Yes.

9 Q. You talked about the letter that Mr. Adams' firm  
10 sent, but you didn't discuss the letter that Fred's sent  
11 back, correct?

12 A. I didn't.

13 Q. What is Fred's again?

14 A. Fred's is a chain of retail stores similar to  
15 Roses, similar to Walmart but smaller, that's based in  
16 Memphis, Tennessee.

17 Q. Now, do you see in your binder Defendant's D-50?

18 MR. PUZELLA: Could you put that up, please.

19 Q. (By Mr. Puzella) Is this the letter that Fred's  
20 wrote back to Variety stores in response to the cease and  
21 desist letter that you testified about?

22 A. D-50? I don't have a D-50.

23 Q. I'm sorry, sir. Maybe we'll just look at the  
24 screen then. Is this the letter from Fred's in response to  
25 Variety's cease and desist?

1           A.     Yes, it appears to be.

2           Q.     If you turn to the second page at the top, Fred's  
3     disputed Variety's exclusive right to use the word "backyard"  
4     on grills, correct?

5           A.     Correct.

6           Q.     And in that letter, Fred identified examples of  
7     other companies that have registered and applied to register  
8     trademarks containing the term "backyard," right?

9           A.     Correct.

10          Q.     And one of the trademarks from other companies that  
11     Fred's identified in its letter was Texas Backyard, correct?

12          A.     Correct.

13          Q.     And another of the trademarks that Fred's  
14     identified was Simply Backyards, correct?

15          A.     Correct.

16          Q.     And it identified Backyard Botanical?

17          A.     Correct.

18          Q.     Backyard Beyond?

19          A.     Correct.

20          Q.     Backyard Treasures?

21          A.     Right.

22          Q.     Backyard Designs?

23          A.     Yes.

24          Q.     The Backyard Bunch and H-E-B Texas Backyard,  
25     correct?



1           A.     Yes.

2           Q.     So at least as of the date of Fred's response  
3 letter, September 8, 2009, Variety was aware of the company's  
4 registrations of the marks containing the term "backyard"  
5 that were indicated in the letter at least, correct?

6           A.     Yes.

7           Q.     And Variety never conducted any investigation into  
8 any of those companies' uses of Backyards, correct?

9           A.     We weren't commercially aware of them as being --  
10 representing any prospect of actual confusion to our  
11 customers.

12          Q.     I asked a very specific question, sir. Variety did  
13 not conduct any investigation into their uses of Backyard,  
14 correct?

15          A.     We did not conduct such a search because we didn't  
16 see any -- we were not aware of any actual confusion or  
17 likelihood of confusion from any of those named.

18          Q.     And in the Fred's letter, Fred's took the position  
19 that Variety's rights in the next paragraph are so limited  
20 that its rights are limited to the -- underlined -- precise  
21 mark The Backyard for the specific -- underlined again --  
22 lawn and garden goods and services which your client has used  
23 on its mark. Do you see that?

24          A.     Yes.

25          Q.     And your testimony on direct was that Fred's agreed

1 to stop using Backyard Traditions on grills in 2009?

2 A. They stopped using it.

3 Q. But you don't have a written agreement with Fred's  
4 reflecting their agreement to stop selling, correct?

5 A. No. It was not done under a written agreement. It  
6 was done through communications between officers at our  
7 company and officers at their company and then, in fact, they  
8 stopped.

9 Q. And we just have to rely on your memory then  
10 because we don't have a written agreement reflecting their  
11 agreement to stop, correct?

12 A. That's true.

13 MR. PUZELLA: I offer D-50, your Honor.

14 THE COURT: Received.

15 **(Defendant's Exhibit No. D-50 received into evidence)**

16 Q. (By Mr. Puzella) Mr. Blackburn, you agree the word  
17 "backyard" is widely used by other companies with regard to  
18 grill equipment?

19 A. With grill equipment?

20 Q. Yes.

21 A. I have testified previously in deposition that the  
22 word "backyard" was widely used.

23 Q. So you would agree with that.

24 A. That it's widely used on grills? Well, 108 million  
25 units of Backyard things have been sold by Walmart, that's

1 true. So that certainly would be widely used.

2 Q. But in your deposition in 2014 you testified that  
3 the word "backyard" is widely used on grills?

4 A. Yes. At that time you all produced in front of me  
5 a stack of pages with various uses of Backyard -- all of a  
6 sudden in a deposition -- and I thumbed through them and I  
7 saw, yes, Backyard's there. Without being able to check and  
8 see were these just statements of use that never got used in  
9 commerce, what were they, you know. And so from looking at  
10 those it appeared it was widely used and that was without  
11 showing -- that was without being able to substantiate that  
12 they were widely used actually in commerce as opposed to in  
13 those documents that you showed.

14 Q. During the case Walmart asked Variety a series of  
15 questions in a document called a Request for Admissions. Do  
16 you recall that?

17 A. Yes.

18 Q. A Request for Admissions is a document that asks  
19 the other side in a lawsuit like this to either admit or deny  
20 a fact; is that correct?

21 A. Yes.

22 Q. If you could turn to D-191 in your binder.

23 MR. PUZELLA: Please put that up.

24 Q. (By Mr. Puzella) This is Variety's responses to  
25 Walmart's Request for Admissions?

1 A. Yes.

2 Q. And you reviewed the questions that Walmart asked  
3 Variety in this document, correct?

4 A. Yes.

5 Q. Could you turn to request number 8 on page 5. And  
6 there Variety admitted that it has never filed a legal  
7 proceeding in the trademark office against any company --

8 A. Wait a minute. I'm sorry, where are we?

9 Q. Question number 8 on page 5.

10 A. Okay.

11 Q. Do you have it, sir?

12 A. Yes.

13 Q. In there Variety admitted that it had never  
14 commenced a proceeding before the trademark trial and appeals  
15 against marks registered by third parties. That means other  
16 companies, right?

17 A. Yes.

18 Q. Unrelated to opposer. That's Variety, correct?

19 A. Correct.

20 Q. And incorporating the term "backyard"?

21 A. That's correct.

22 Q. And in response to request number 9 on page 5 --

23 A. That, of course, was other than that action there.  
24 The action we commenced against Walmart.

25 Q. Sir, your counsel will have an opportunity to

1 examine you again. I'm just asking you specific questions.  
2 Please just answer those, okay?

3 A. Yes.

4 Q. Request number 9 on page 5, Variety admitted that  
5 it has never commenced an action in state or federal court  
6 against any third parties for using a mark incorporating the  
7 term "backyard." Variety admitted that, correct?

8 A. That's correct.

9 Q. The Requests for Admissions also contained a series  
10 of questions about specific companies who owned registrations  
11 for trademarks containing the word "backyard," right?

12 A. Yes.

13 Q. For example, in response to request number 62 on  
14 page 12, Variety admitted that the trademark Backyard Chef is  
15 registered with the United States Patent and Trademark  
16 Office, correct?

17 A. Yes.

18 Q. And in response to request number 63 on page 12,  
19 Variety admitted that it did not object to the registration  
20 of The Backyard Chef trademark, correct?

21 A. Correct.

22 Q. And in response to request number 64 on page 12,  
23 Variety admitted that it did not object to the use of The  
24 Backyard Chef trademark, correct?

25 A. Correct.

1 Q. And another example, request number 65 on page 12,  
2 Variety admitted that the trademark Backyard Basics is  
3 registered with the United States Patent and Trademark  
4 Office, correct?

5 A. Correct.

6 Q. And in response to request 66, Variety also  
7 admitted that it did not object to the registration of The  
8 Backyard Basics trademark, correct?

9 A. Correct.

10 Q. And in 67, Variety admitted that it did not object  
11 to the use of The Backyard Basics mark, correct?

12 A. Yes.

13 Q. Just one more example. Request 140 on page 22.  
14 There Variety admitted that the trademark Backyard Classic is  
15 registered with the United States Patent and Trademark  
16 Office, correct?

17 A. Wait a minute, I'm not up with you.

18 Q. Sure. Page 22, sir.

19 A. Number 140?

20 Q. Yes. Variety admitted that the trademark Backyard  
21 Classic was registered with the United States Patent and  
22 Trademark Office, correct?

23 A. Correct.

24 Q. And 141, Variety admitted that it did not object to  
25 the registration of that mark, correct?

1           A.     Correct.

2           Q.     And 142, Variety also admitted that it did not  
3 object to the use of that mark, correct?

4           A.     Correct.

5           Q.     Without going through every example in this  
6 document, Exhibit D-191, would it be fair to say that there  
7 are more than 40 different trademark registrations with the  
8 trademark office that Variety admitted are registered?

9           A.     Are registered?

10          Q.     With the --

11          A.     I haven't counted them up. I don't know.

12          Q.     Well, you can either take my word for it, sir, or  
13 you're welcome to count them if you like.

14          A.     I'll take your word for it.

15          Q.     Okay. And Variety didn't object to any of those  
16 registrations, correct?

17          A.     Correct. We filed no formal objection.

18          Q.     And Variety did not object to the use of any of  
19 those trademarks, correct?

20          A.     Correct.

21                 MR. PUZELLA: Your Honor, I offer the document.

22                 THE COURT: Let it be received.

23                 **(Defendant's Exhibit No. D-191 received into evidence)**

24          Q.     (By Mr. Puzella) You testified on direct that  
25 Variety has not identified any examples of actual confusion

1 in the marketplace, right?

2 A. Yes.

3 Q. You're unaware of a single shopper making a  
4 complaint reflecting some confusion between the parties'  
5 trademarks, correct?

6 A. Correct.

7 Q. And Variety didn't conduct any expert surveys to  
8 determine whether consumers are likely to confuse Walmart's  
9 trademark and Variety's trademark, correct?

10 A. We did not.

11 MR. PUZELLA: May I have a moment, your Honor. I  
12 may be done.

13 (Defense counsel conferring briefly at counsel table off the  
14 record)

15 Q. (By Mr. Puzella) Sir, you testified in your direct  
16 concerning Variety's sales of Backyard products. Do you  
17 recall that?

18 A. Could you repeat that?

19 Q. You testified on your direct concerning the sales  
20 of The Backyard products that Variety -- the dollar amount.  
21 Do you recall that?

22 A. Yes.

23 Q. Has Variety done anything to break out its sales  
24 for goods sold using the mark The Backyard on grills  
25 particularly?



1           A.     Just on the grills?

2           Q.     Yes.

3           A.     In generating those numbers, it would have been --  
4 they would have been generated by SKU, so it wouldn't -- that  
5 information would have been available, but we were just  
6 showing the full use of Backyard -- what we have sold under  
7 that mark.

8           Q.     But sitting here at the moment, you don't know the  
9 dollar amount of grills and grilling accessories that were  
10 sold using the mark The Backyard, correct?

11          A.     No, I do not know.

12          Q.     And you also do not know the breakdown among those  
13 products as to what products were sold using The Backyard,  
14 the registered mark, or Backyard BBQ, or just Backyard  
15 standing alone; is that correct?

16          A.     I am not aware of uses -- I haven't found any uses  
17 myself -- this is what I was testifying to earlier -- of the  
18 mark other than using The Backyard. I haven't found one yet.  
19 I told you we claimed rights in it. If it had been used, in  
20 case it had been used, but we -- I have so far not discovered  
21 any such uses.

22                 MR. PUZELLA: No further questions, your Honor.

23                 THE COURT: Any redirect?

24                 MR. ADAMS: Just a few, your Honor.

25                 ///

**REDIRECT EXAMINATION**

BY MR. ADAMS:

Q. Mr. Blackburn, turning back to D-196. This is the paper from the Patent and Trademark Office that indicated that the trademark office had not found any conflicting marks with Walmart's trademark application. Do you remember that?

A. Yes.

Q. And it also says that any registered or pending marks, correct?

A. Yes.

Q. What does that tell you about types of trademarks that the trademark office does not consider in determining whether or not a trademark is registerable?

A. Marks that may have been used and have common law marks as opposed to those that have actually been registered.

Q. Like the marks that Variety had been using, The Backyard BBQ and some of the others that were not registered?

A. Yes.

Q. So the trademark office would not have been aware of any of those uses, would they?

A. No.

Q. Now, you've also testified about the opposition. Do you understand what the purpose of the trademark opposition is after a trademark has been allowed by the trademark office?

1           A.     Precisely so that objections like the one we  
2 brought could be brought. That's the whole point. You have  
3 the opportunity to object and to come in and that the  
4 trademark office will listen to the facts of the matter.

5           Q.     And that's exactly what Variety did in this case,  
6 correct?

7           A.     Correct.

8           Q.     It filed an opposition against the allowance of  
9 this trademark based on information that the trademark office  
10 did not have, correct?

11          A.     Correct.

12          Q.     And that proceeding is still pending, is it not?

13          A.     It is.

14          Q.     So the Trademark Office has never allowed Walmart's  
15 trademark application on Backyard Grill, has it?

16          A.     They have not.

17          Q.     Now, turning to D-50, this is a letter from the  
18 lawyers for Fred's?

19          A.     I don't have that.

20          Q.     We'll bring you the copy, Mr. Blackburn. While  
21 he's doing that I'll ask you, how many cease and desist  
22 letters have you seen in your legal career?

23          A.     A lot.

24          Q.     And is there a typical way that a lawyer responds  
25 to a cease and desist letter?

1           A.     Yes.

2           Q.     Do the lawyers typically throw up their hands and  
3 say, oh, you're exactly right, we're so sorry?

4           A.     No.

5           Q.     Is it more likely than not that the typical  
6 response to a cease and desist letter is like the one that  
7 Walmart showed you?

8           A.     Like the one Walmart showed me.

9           Q.     Yes. But after Fred's lawyer sent you -- sent that  
10 letter back, what did Fred's do?

11          A.     Stopped selling.

12          Q.     Thank you. Now turn to D-91. Mr. Puzella went  
13 down a laundry list of marks and registration numbers,  
14 correct?

15          A.     Yes.

16          Q.     And he asked you whether or not Variety had opposed  
17 or taken some action against those registrations, correct?

18          A.     Yes.

19          Q.     Did Walmart furnish any evidence to Variety in  
20 submitting those requests that any of those trademarks were  
21 actually still in use?

22          A.     No.

23          Q.     Did Walmart submit any information for you to  
24 consider about what particular goods or services any of those  
25 registrations may be related to?

1	A.	No.
---	----	-----

2 MR. ADAMS: No further questions.

3 Your Honor, we would like to move into evidence  
4 three more exhibits. P-22, 59 and 79.

5 THE COURT: They'll be received.

(Plaintiff's Exhibit Nos. P-22, 59 and 79 received into  
evidence)

8 MR. PUZELLA: May I have a minute, your Honor?

9 THE COURT: This witness can step down.

10 (Witness Excused)

11 THE COURT: Do you have another witness?

12 MR. ADAMS: Your Honor, at this time we have a  
13 deposition designation whereby we will be reading excerpts of  
14 testimony from one of Walmart's witnesses, Ms. Dineen. She  
15 was deposed during this litigation.

16 THE COURT: All right.

17 MR. ADAMS: All right. One of the attorneys for  
18 Variety, Ms. Trimmer, will, and with the Court's permission,  
19 sit in the witness box and read Ms. Dineen's answers.

20 THE COURT: This is the testimony of someone that  
21 was taken at another time under the Rules of Procedure and  
22 Evidence. They're not here today to actually present  
23 themselves, but their sworn testimony is going to be read to  
24 you by the lawyer and someone standing in for the witness.

25 MR. PUZELLA: Just to close the loop, your Honor,

1 on the documents that the plaintiffs would like to admit, 22,  
2 59 and 79. No objections for 22 and 59, but 79 is a page  
3 from a treatise. It's -- it wasn't testified to by the  
4 witness.

5 THE COURT: All right. Disallowed.

6 MR. PUZELLA: So we object.

7 MR. ADAMS: We'll withdraw that request as to 79.

8 THE COURT: All right.

9 **(Plaintiff's Exhibit No. 79 withdrawn)**

10 (Attorney Trimmer approached the witness stand)

11 MR. ADAMS: Just -- your Honor, is it your  
12 practice -- anything further I should say to the jury, you  
13 should say to the jury about the way this process works other  
14 than what's already been said?

15 THE COURT: I just told them that this is a witness  
16 who will be identified who was taken -- whose testimony was  
17 taken under oath earlier in time and it's admissible under  
18 the Rules of Procedure in this trial.

19 MR. ADAMS: Thank you, your Honor.

20 MR. HOSP: Your Honor, this witness is available  
21 tomorrow. It's not clear why the deposition designation is  
22 being used.

23 THE COURT: I don't know.

24 MR. ADAMS: Well, we say Ms. Dineen's name --

25 THE COURT: It's their party, right?

1 MR. ADAMS: Right.

2 THE COURT: So you can use it as testimony of an  
3 adverse witness.

4 MR. ADAMS: Anything she said is an admission  
5 against Walmart's interest. She was a 30(b)(6) witness.

6 THE COURT: Okay.

7 MR. ADAMS: All right, Ms. Trimmer, step into the  
8 role of Ms. Dineen for the next little while.

9 **KAREN DINEEN**

10 having been duly sworn, testified as follows via deposition  
11 testimony [as read into the record by Attorney Trimmer]:

12 **DIRECT EXAMINATION**

13 BY MR. ADAMS:

14 Q. Would you state your name for the record.

15 A. Karen Dineen.

16 Q. You need to speak up just a little bit.

17 A. Karen Dineen.

18 Q. I'd like you to turn to the first excerpt, which I  
19 think is on page 12.

20 And you understand with regard to this 30(b)(6)  
21 notice that you're here not testifying in your individual  
22 capacity, but as a representative of Walmart. Do you  
23 understand that?

24 A. Yes.

25 Q. And do you also understand that you have been

1 tendered as one who has sufficient knowledge in these areas  
2 of inquiry to give full and complete answers; is that  
3 correct?

4 A. Yes.

5 Q. On page 24. Okay. Who does Walmart consider its  
6 biggest competitors in the sale of grills and grill  
7 accessories?

8 A. Overall, I think we look at almost everybody who  
9 sells the same categories and gives the customer another  
10 choice in these categories. Recently, primarily some of the  
11 biggest competition has come from home improvement stores  
12 like, for example, a Home Depot.

13 Q. I understand you to say that -- just before that  
14 part of your answer that you really consider all companies  
15 that sell grill and grill accessories to be a Walmart  
16 competitor; is that right?

17 A. Yes. We have a broad base of customers and they  
18 have many choices, so we really can't overlook too many  
19 competitors.

20 Q. So about when was it that Walmart decided to adopt  
21 a new trademark for grill and grill accessories? So the  
22 question is -- I'm sorry --

23 A. So the question is?

24 Q. About when was that?

25 A. When was that. That would have been in probably



1 the second half of 2010.

2 Q. Who would have been the one or two individuals that  
3 would have been most responsible for conceiving and pushing  
4 this idea forward? The one that began say in the second half  
5 of 2010 to have a private brand grill program?

6 A. Marvin Deshommes.

7 Q. Anyone else?

8 A. Erick Moreira and MiKaela Lemmon.

9 Q. And just based on your understanding, how did that  
10 program proceed just generally? Again, we -- we'll look at  
11 some exhibits, but right now I just want to get an overview  
12 of what happened.

13 A. Initially Marvin from the category gave the  
14 challenge to Erick, who was a director on the brand team, to  
15 develop a private brand for grilling categories. So how that  
16 process went, Erick brainstormed on names that would resonate  
17 with the customer in these categories. Then a preliminary  
18 legal search is done which most often narrows it down. With  
19 those names, we conduct customer insights to see what the  
20 customer thinks. That usually narrows it down again, and  
21 then we go back to legal for a more complete search and then,  
22 if necessary, perhaps go back out to customer insights. And  
23 then we would take all of the data points, the brand team  
24 would make a recommendation to the merchants and get the  
25 approvals.

1 MR. HOSP: Your Honor --

2 Q. (By Mr. Adams) So is that what you believe  
3 happened in this case?

4 A. Yes.

5 Q. So it's your testimony --

6 MR. HOSP: Your Honor, objection. Objection, just  
7 for the record. It's being introduced for an improper  
8 purpose.

9 THE COURT: What's that?

10 MR. HOSP: I'm just objecting because it's being  
11 introduced for an improper purpose. This relates to the memo  
12 that we had filed regarding the privilege issue.

13 THE COURT: Okay. Overruled.

14 MR. ADAMS: I'm sorry, it doesn't, your Honor.

15 THE COURT: Overruled. Let's go ahead. Is this a  
16 long deposition or a couple minutes?

17 MR. ADAMS: It's not a couple minutes, but it's not  
18 a long one either.

19 THE COURT: What's your "not a long one"?

20 MR. ADAMS: Eight minutes.

21 THE COURT: Okay. Go ahead and get rid of it.

22 Q. (By Mr. Adams) So it's your testimony that in  
23 roughly March or May of 2011, at that point you were  
24 finalizing this as The Backyard Grill name, yes?

25 A. Yes.

1 Q. Now, turn to page 30. Okay. When did Walmart --

2 A. I'm sorry, what page?

3 Q. I'm sorry, page 30.

4 A. Thank you.

5 Q. Okay. When did Walmart -- and again, there may be  
6 people at Walmart, probably are, that you have no knowledge  
7 of and I'm asking you to answer within your own knowledge --  
8 but as far as you know, when did you or anyone you spoke to  
9 at Walmart first become aware that Variety Stores and Variety  
10 Wholesalers were selling grills that included the word  
11 "backyard"?

12 A. We -- and this is the we -- so the brand team that  
13 was working on this at the time is the we, okay -- became  
14 aware that Variety Stores had registered the name The  
15 Backyard in our development process, so that would have been  
16 in early 2011.

17 Q. And how was it that you learned about the  
18 registration?

19 MR. HOSP: Same objection, your Honor.

20 THE COURT: Overruled.

21 A. We were made aware of it from our legal team.

22 Q. (By Mr. Adams) Okay. Did Walmart do any follow-up  
23 to gain any further information about how Variety was using  
24 the trademark?

25 A. Yeah. We were made aware of it -- of what I had

1 said before. The Variety -- that Variety had registered the  
2 name The Backyard.

3 Q. Now 34. I'm handing you a -- the witness a  
4 document marked for identification as Exhibit 20. Can you  
5 identify this document, Exhibit 20, for the record, please.

6 A. Yes. This is a result of a customer insight  
7 survey.

8 Q. Who produced this survey?

9 A. The company is MAPS, and we also refer to this --  
10 refer this to a LUCI survey. LUCI study. I'm not sure, yet  
11 it does show up on here. The LUCI.

12 Q. Is that an acronym for something?

13 A. Yes.

14 Q. What?

15 A. It's a very good acronym. Sometimes we forget what  
16 they stand for, but I do recall. I think it's Learning and  
17 Understanding Consumer Insights to the best of my  
18 recollection.

19 Q. And what particular product or product categories  
20 was this survey directed towards?

21 A. This was for grills.

22 Q. All right. Now, look at this and my understanding,  
23 correct me if I'm wrong, is that there are a series of  
24 questions that are contained or that's a totalization of  
25 responses to questions, numbered questions in this document,

1 correct?

2 A. Yes.

3 Q. All right. So let's take an example. T-1 would be  
4 question one, correct?

5 A. Yes.

6 Q. Starting on the front page, which is WM00675, I see  
7 as I flip through the pages that there seem to be a number of  
8 different terms. Grill Mark, for example. Grill Time, Grill  
9 Master, Grill Works. Do you know how these names were  
10 selected?

11 A. Yes. These names were selected -- some from the  
12 brand team brainstorming ideas for names for our private  
13 brand and some names that were already existing in the market  
14 that we wanted to measure the new ideas against.

15 Q. I see. Correct me if I'm wrong, but I didn't see  
16 Backyard Grill identified as one of these. Is that your  
17 understanding as well?

18 A. Correct.

19 Q. Is there a particular reason for that?

20 A. Yes. This looks like it was the initial round of  
21 names, and it was not in the initial group of names we looked  
22 at.

23 Q. And do you know why not?

24 A. It didn't come up through the process of the  
25 brainstorming by the brand team at that time.

1           Q.     All right.  Okay.  Turn it over to page 687, which  
2     is a few pages in.  This will be the case, I think, also for  
3     Q-1, but for Q-2 I see a reference to Backyard Barbecue.  Do  
4     you see that?

5           A.     Yes.

6           Q.     So that was one of the initial choices that was  
7     being sampled and tested, correct?

8           A.     Yes.

9           Q.     And can you -- you may need to flip through here  
10    just for a second, but can you characterize based on your own  
11    understanding how that ranked in terms of the other marks  
12    that were being sampled at that time?

13          A.     Backyard Barbecue did come up in the customer  
14    insights, not in the top.  In this initial round of customer  
15    insights it did not come up in the top names.

16          Q.     What were the top two or three names?

17          A.     It was Grill Master, and I think we provided this.  
18    I would be guessing at the other ones.  It's in there.  Grill  
19    Master was one.

20          Q.     All right.  Page 40.  Do you know why that's the  
21    case, why Grill Master wasn't chosen as Walmart's private  
22    brand of barbecue grills?

23          A.     Okay.  So yes.

24          Q.     And why was that?

25          A.     It was not available for use for a private brand.

1 Q. And how do you know that?

2 MR. HOSP: Same objection, your Honor.

3 THE COURT: Overruled.

4 A. From our legal team's advice or legal team's  
5 information.

6 Q. (By Mr. Adams) Now turn to 46. I'm going to hand  
7 you a document marked for identification as Exhibit 25. I  
8 tried to group these the way it seemed to me they were  
9 produced. In other words, if there's something together like  
10 this, it's my understanding they should go together by all  
11 means, but if you think for whatever reason they don't go  
12 together, just let me know.

13 I'm going to skip down to line 11. All right. If  
14 you look squarely in the middle of the first page, you see  
15 "Grill LUCI XLSX." Is that the attachment you see to this?

16 A. I believe it is.

17 Q. So let's go back to the first page of this exhibit.  
18 It says, "MiKaela and Joe, I think you meant to say these two  
19 names." We'll skip over that. "These two names are very  
20 close." Which two names do you understand was being  
21 compared? Which two names are very close?

22 A. Grill Works and Backyard Barbecue.

23 Q. And it says, "Based on this information, Grill  
24 Works, top three box, 25 percent versus Backyard Barbecue  
25 18 percent. I would recommend Grill Works." Did I read that

1 correctly?

2 A. Yes.

3 Q. And this document is dated December 17, 2010. So  
4 based on your earlier testimony, this would have been fairly  
5 early in the program process, correct, picking a name for  
6 your private brand?

7 A. Yes. This was the first insight survey we did.

8 Q. Okay. There is -- okay. There was a particular  
9 reason why Walmart didn't just go ahead at this point and  
10 adopt Grill Works for its private brand trademark?

11 A. Yes.

12 MR. HOSP: Same objection, your Honor.

13 THE COURT: Overruled.

14 Q. (By Mr. Adams) What was that? That's at line ten.

15 A. Okay. So after the step of getting insights, the  
16 next step, as I stated previously, was to do a more complete  
17 legal search. And after consulting with legal on this, we  
18 decided not to go forward with Grill Works.

19 Q. Okay. At that point do you know why Walmart simply  
20 didn't take the second choice, which was Backyard Barbecue,  
21 especially when he says, "We are truly splitting hairs with  
22 these findings"? Wouldn't Backyard Barbecue have been almost  
23 as good?

24 A. Okay. So it would have been the next choice, and  
25 in one of the next steps it did become the next choice.



1           Q.     Okay.  And is there a particular reason why Walmart  
2     did not adopt Backyard Barbecue as its private brand grill  
3     trademark?

4                 MR. HOSP:  Same objection.

5                 THE COURT:  Overruled.

6           A.     Okay.  Yes.  After consulting with legal, we  
7     decided not to move forward with Backyard Barbecue.

8           Q.     (By Mr. Adams)  All right.  Ms. Dineen, I've handed  
9     you a document marked for identification as Exhibit 26.  
10    Would you just take a moment and look at that and I'll ask  
11    you a couple questions.

12          A.     Okay.

13          Q.     Now, this refers -- up at the very top it says,  
14    "Just an update.  I've asked Brent for a timeline on the  
15    second round of research of grills, et cetera."  You've  
16    testified about the second round already, correct?

17          A.     Yes.

18          Q.     Below it says, quote, in the meantime, we need to  
19    determine which names we want to pursue for that research  
20    based on what we now know we cannot use, close quotes.  Does  
21    that refer to the legal advice you had previously received  
22    about certain names that simply weren't available?

23                 MR. HOSP:  Same objection.

24                 THE COURT:  Overruled.

25          A.     Yes.  The second round is based on the information

1 we received since the customer insights and then looking at  
2 which names now we want to look at going forward.

3 Q. (By Mr. Adams) All right. Over to page 51. So I  
4 hand you a document marked for identification as Exhibit 27,  
5 Ms. Dineen. We're still in 2010, correct?

6 A. Yes.

7 Q. So this is still at a relatively early stage of  
8 selecting a trademark for grill -- grills program, correct?

9 A. Yes.

10 Q. Okay. Now, what do you interpret the statement,  
11 quote, please add Barbecue Master, close quotes, to mean?  
12 Yeah, let's just look down on the document. Do you see just  
13 below the subject that says, quote, please add BBQ Master,  
14 close quotes. Do you know what that refers to?

15 A. Wanting to get further insight or information on  
16 the name BBQ Master.

17 Q. So that was added to the survey effectively for the  
18 second round; is that right?

19 A. I would have to look. I don't know which has been  
20 added to, a survey or a different list.

21 Q. All right. I'm going to skip over to page 52 --  
22 I'm sorry -- 53, line 17. I think the question was, the  
23 statement is Backyard Barbecue seems too long a name. Is  
24 that your understanding, that that was at least one reason  
25 among perhaps others why Walmart did not select Backyard

1 Barbecue as its private brand grill trademark?

2 A. No. I think at the time of the decision that was  
3 not a factor.

4 Q. Page 58. Let me hand you a copy of Exhibit 28 --  
5 29, Ms. Dineen. If you would, please take a couple minutes  
6 or however much time you need to look at this.

7 A. Okay.

8 Q. Can you identify this document for the record?

9 A. This is another round of customer insights for a  
10 grill and grill accessories private brand.

11 Q. Okay. And what's the date on this document?

12 A. It was prepared by MAPS on 2/9/11.

13 Q. Okay. Now, this is roughly maybe eight or nine  
14 months prior to the end of the use of the mark based on your  
15 testimony just a few moments ago, right? I think you said  
16 the date of first use, that you thought it was around the  
17 fourth quarter of 2011?

18 A. Yes.

19 Q. Okay. So is it fair to say that at this point  
20 you're still considering which trademark to use or not use?

21 A. Yes.

22 Q. And can you characterize -- just based on your  
23 understanding and knowledge of this document -- how it shook  
24 out in terms of the most favorable mark for use?

25 A. One thing that we did learn from this is that we

1 had several new names that resonated with the customer better  
2 than our existing private brand, Mainstays, that had been in  
3 grill -- in grill accessories but had never been in grills.  
4 As far as the top names in this round, I don't recall exactly  
5 the top names here, but I know this had -- had led us after  
6 using some of the other processes to consider Backyard  
7 Barbecue.

8 Q. Does Backyard Grill appear in this study?

9 A. No.

10 Q. Okay. Does Backyard Grill appear on any of these  
11 MAPS studies before it was selected by Walmart for use?

12 A. Yes.

13 Q. Which ones?

14 A. It was after this one dated 2/9/11, yes.

15 Q. Now over to page 61. Okay. I hand you a document  
16 marked for identification as Exhibit 32. Would you take a  
17 look at this and identify it for the record.

18 A. Okay.

19 Q. Reading from the top of this document it says,  
20 "Spoke with Erick and the name for the private label and  
21 grill shop looks to be, quote, Backyard Barbecue, close  
22 quotes. I endorsed the name understanding what is available  
23 to us."

24 Okay. Now, what do you understand this offer to  
25 mean when he says, quote, I endorsed the name understanding

1     what is available to us, close quotes?

2           A.     Yes. This is from Dena, who was the vice-president  
3     of the total outdoor living complex then, and getting her  
4     endorsement on the name pending next steps that we would  
5     take -- next steps that we would take and information we  
6     would get.

7           Q.     Okay. And this document is dated roughly when?

8           A.     The e-mail below it is February 22nd. I don't see  
9     a date. I would think it's not too far after that.

10          Q.     All right. Down to line 13. And what was the plan  
11     B name?

12          A.     One of them was Backyard Grill, which we did end up  
13     selecting. If there were other ones in the survey, they  
14     would be in those documents. I can't recall now.

15          Q.     Okay. Well, considering that in this document the  
16     name Backyard Grill is being endorsed as the name to be used,  
17     why is it that it wasn't used?

18          A.     Okay. After going to one of our next steps with  
19     further research with legal and consulting with legal, we  
20     decided not to move forward with Backyard Barbecue.

21                 MR. HOSP: Same objection.

22                 MR. ADAMS: Excuse me, Mr. --

23                 THE COURT: Overruled.

24                 MR. ADAMS: Mr. Shaw noted in my question I said  
25     Backyard Grill instead of Backyard Barbecue. So correct

1     that.

2             All right. Top of page 64. We're almost through,  
3     your Honor.

4             Q.     (By Mr. Adams) Go ahead, Ms. Dineen. Top of page  
5     64.

6             A.     Okay. After going to one of our next steps with  
7     further research with legal and consulting with legal, we  
8     decided not to move forward with Backyard Barbecue.

9             Q.     All right. Well, look down at the e-mail in the  
10    lower half of that page, the one you referenced dated  
11    February 22, 2011. Doesn't this indicate that the name  
12    Backyard BBQ had already cleared legal and customer insights  
13    on potential names?

14            A.     One step. As our process, I explained, we would  
15    brainstorm and develop names, do a preliminary legal search,  
16    do customer insights, and then do a more complete search. So  
17    that may be referencing one of the legal searches.

18            MR. ADAMS: Okay. Your Honor, I'm going to end at  
19    this point. I'll take up -- I'll take up the rest of this  
20    with Ms. Dineen during cross-examination.

21            And I move into evidence PX-71 and 72 -- I'm sorry,  
22    P-71 and P-72, P-14.

23            MR. HOSP: We have objected, your Honor, but we  
24    understand your ruling.

25            THE COURT: All right. Let them be received.



1 the record)

2 MR. ADAMS: I think we have everything, your Honor.  
3 Thank you.

4 THE COURT: All right. Then you rest.

5 And I'm going to let the jury go and we'll begin  
6 tomorrow at 9:30 with your case.

7 MR. PUZELLA: Yes, your Honor. We have a Rule 50  
8 motion. Should we address that after?

9 THE COURT: I understand. I'm going to just deal  
10 with the jury.

11 MR. PUZELLA: Very good.

12 THE COURT: Ladies and gentlemen, so we'll come  
13 back tomorrow at 9:30 and don't talk to anybody about the  
14 case, don't form any conclusive opinions. Just leave it out  
15 of your mind. Put your books back in the jury room and  
16 they'll be secure and locked and you can pick them up  
17 tomorrow. Everybody okay to come back at 9:30? Okay. Good.

18 Well, have a good evening and safe drive and we'll  
19 see you tomorrow.

20 I'll stay on the bench while the jury goes out.

21 (Jury out at 4:56 p.m.)

22 THE COURT: You have a Rule 50 motion?

23 MR. PUZELLA: Yes, your Honor.

24 THE COURT: I'll hear that in the morning.

25 MR. PUZELLA: Very good.



1           THE COURT: Thank you. We'll be prepared for  
2 tomorrow. Thank you.

3           We'll be in recess.  
4  
5

6                       (Hearing adjourned at 4:58 p.m.)  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NORTH CAROLINA  
3

4 CERTIFICATE OF OFFICIAL REPORTER  
5

6 I, Michelle A. McGirr, RPR, CRR, CRC, Federal  
7 Official Court Reporter, in and for the United States  
8 District Court for the Eastern District of North Carolina, do  
9 hereby certify that pursuant to Section 753, Title 28, United  
10 States Code, that the foregoing is a true and accurate  
11 transcript of my stenographically reported proceedings held  
12 in the above-entitled matter and that the transcript page  
13 format is in conformance with the regulations of the Judicial  
14 Conference of the United States.  
15

16 Dated this 15th day of November, 2018  
17

18 /s/ Michelle A. McGirr  
19 MICHELLE A. MCGIRR  
20 RPR, CRR, CRC  
21 U.S. Official Court Reporter  
22  
23  
24  
25